

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION 97-cv-3496-DRD

1	WALSH SECURITIES,	:	TRANSCRIPT OF PROCEEDINGS
2		:	
3	Plaintiff,	:	M O T I O N
4		:	
5	-vs-	:	Pages 1 - 86
6	CRISTO PROPERTY,	:	
7	Defendant.	:	
8	- - - - -	:	

Newark, New Jersey
January 17, 2012

B E F O R E: HONORABLE DICKINSON R. DEBEVOISE,
SENIOR UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Pursuant to Section 753 Title 28 United States Code, the
following transcript is certified to be an accurate record as
taken stenographically in the above entitled proceedings.

M/Mollie Ann Giordano
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Official Court Reporter
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1 THE COURT: The question will be, how are we going to
2 allocate our limited time?

3 MR. MAGNANINI: Bob Magnanini for Walsh Securities. I
4 thought I was going to handle our affirmative motion for
5 partial summary judgment, and then my associates Amy Wagner,
6 Jeff Shoom, and Dan Mee had each taken a lead to responding to
7 the defendants' three motions for summary judgment. I was
8 going to let the defendants respond to me, and let them go
9 ahead and lay out their summary judgment motions, and each of
10 my associates could respond in kind, and I would have a short
11 reply at the end.

12 THE COURT: I'm going to have to limit your time.
13 All right. What do you think? It's now about 11
14 o'clock. Well, why don't we give you 45 minutes for the whole
15 motion for summary judgment, I gather, on both title policies
16 and the closing protection letters. All right. Well, go
17 ahead. I was going to do it differently, but we'll do it your
18 way. Everybody else can be seated.

19 MR. MAGNANINI: Thank you, your Honor. I should be
20 able to get through this a little quicker than 45 minutes.
21 We've inundated you with a lot of paper.

22 THE COURT: Well, I've been wading through the mass of
23 material which keeps coming in, but gradually I think I'm
24 getting the gist of it all. Yes, go ahead.

25 MR. MAGNANINI: Robert Magnanini from the law firm of

1 Stone & Magnanini. Your Honor, we apologize for the delivery
2 this morning of the courtesy copy to you. By the time we
3 completed our papers on Friday night, we had missed the Fed Ex
4 deadlines. If we put it in Fed Ex, you wouldn't have gotten it
5 until tomorrow, which is why we hand delivered it today.

6 First, I'd like to thank you, the Court, for getting
7 this motion to summary judgment. As your Honor knows, this
8 case has been around for 15 years now, since 1997, through a
9 variety of mediation, settlement attempts, three different
10 judges, and now we're here. What Walsh Securities tried to do
11 is cut through all of the chaff and get down to the center of
12 the case. We believe that we were entitled to summary
13 judgment, not on all of the loans, but on 66 of the loans. But
14 the reason Walsh was entitled to summary judgment, Walsh
15 Securities, as your Honor knows, was a mortgage lender in the
16 sub prime market. It had loaned money on these various
17 properties, and it then turned around and sold the properties
18 to whole loan purchasers, such as The Money Store or Cityscape,
19 and there are a variety of other whole loan purchasers as well.
20 And it also took its loans and bundled them into securities.
21 They were unwritten by Donaldson London, who doesn't exist
22 anymore. Goldman Sachs, Solomon Smith Barney, and a variety of
23 entities came into Walsh Securities and reviewed the loan
24 packages that it had. And if they made the cut, those loans
25 were included in the securities.

1 Now, both the securities and sales to the whole loan
2 buyers, Walsh had to issue what they call reps and warrant,
3 representations and warranties that the mortgage was a valid
4 instrument, and that it would perform. And basically what
5 Walsh attested to was that if the mortgage was a product of
6 fraud, if any of the things that Walsh had bargained for wasn't
7 true, i.e., that Walsh got a bona fide purchaser of value, as
8 the mortgagee, that Walsh had an ability to foreclose or pursue
9 any deficiency from the mortgagor or Walsh had a first lien
10 position. If any of those three things weren't true, Walsh was
11 obligated to repurchase loans from the whole money buyers, The
12 Money Store or Cityscape, or it was obligated to repurchase the
13 loans out of five different securities that issued in 1996 or
14 1997. As a result of the fraud that's laid out in the papers,
15 of course, and one of them, the major things in the fraud was
16 not only did Walsh get a strawbuyer, somebody who had no
17 interest in making mortgage payments and no ability to make a
18 mortgage payments, but Walsh got a defective mortgage because
19 at the closing, the straw buyers or someone, since a lot of
20 these papers were not even signed by the straw buyers, executed
21 what they call the joint venture deed.

22 THE COURT: Sixty percent.

23 MR. MAGNANINI: Right, 60 percent. That's an act of
24 default under the terms of the mortgage. So Walsh, unbeknownst
25 to it, was being defrauded when it sold one of these fraud

1 loans and/or included one in the security, the mortgage was
2 already in default. The title was unmarketable. And those
3 entities, the whole line buyers or the securities, had the
4 right to demand that under the reps and warrants, Walsh
5 repurchase the loan. So this universe that we've offered up to
6 the Court of 66 loans includes those that were sold to an
7 entity called The Money Store. Reagon Sarison represented The
8 Money Store and told Walsh it needed to repurchase 28 loans, I
9 believe it was, for 2.4 million dollars. Walsh Securities
10 repurchased those loans and held onto those.

11 Another section of whole loans were sold to an entity
12 called Cityscape. Cityscape, in 1998 or 1999, was going
13 bankrupt and they sued Walsh, and Walsh demanded that they
14 purchase all the loans sold to Cityscape, whether they were the
15 product of this fraud or not.

16 Judge Stein in the Southern District ruled that Walsh
17 had to repurchase 32 of the loans from Cityscape because those
18 32 loans were the product of this fraud. Walsh, by the time
19 that judgment came down, did not have the cash to repurchase
20 the loans. Cityscape obtained a judgment. Walsh then ended up
21 satisfying the judgment and thereby repurchased the 32 loans
22 from Cityscape.

23 The other amount of loans that Walsh had to repurchase
24 were with the securities that are in issue. These loans were
25 repurchased and given to Walsh. So the 66 loans that we were

1 moving on were all loans that had been repurchased by Walsh
2 Securities. All of them, your Honor, except I believe one, and
3 I'm not even sure that this is part of the pool, were then lost
4 at title sales or foreclosed upon by other parties and
5 therefore Walsh got no recovery from the mortgagor, no recovery
6 from a foreclosure, and no ability to pursue the mortgagor -- I
7 keep saying the mortgagor, in their deficiency action. So what
8 we ended up with was, because of the fraud, and because of the
9 subsequent actions of the title company, Walsh Securities was
10 bankrupted and is in the position it's in today. And we
11 pursued this case basically because when I worked at Latham &
12 Watkins in 1997 and we did an investigation, we believe that
13 certain members of Walsh Securities were involved in the fraud,
14 that is Kelly O'Neill and Anthony D'Apolito. They were
15 terminated for the participation in the fraud.

16 THE COURT: Considerable evidence has been presented
17 that Robert and James Walsh were also at least knowledgeable of
18 what was going on.

19 MR. MAGNANINI: And it's in something I'm going to
20 address, your Honor. What I'd like to do is lay down -- and
21 I'll tell you the reason I was getting to this. The reason we
22 pursued this case for so long is that there were two comments
23 made, not on the record, just off the record, by Mr. Kott and
24 Mr. Hayes, that it just stayed around with me. One was in
25 2005, Judge Bassler, after hearing motion argument, asked Mr.

1 Kott: Why haven't the title companies paid? And Mr. Kott
2 said: We think we have some valid defenses. And Judge Bassler
3 said: I'm sure you have case law to back that up. And they
4 said: No, your Honor, we think we can develop something. And
5 they said: We ought to have settlement conferences. The title
6 companies are obligated to pay. We ended up in a mediation
7 that didn't resolve the matter.

8 And the second comment, your Honor, that Mr. Hayes
9 made to Mr. Rappaport during Mr. DeBenedetto's deposition, Mr.
10 DeBenedetto rambled on and on and on. While there was
11 extensive paper given to Mr. DeBenedetto's statement about
12 Robert Walsh and James Walsh's involvement about the fraud,
13 they never mentioned his long-standing running psychological
14 illness, his continued problems and incarceration or
15 commitments for being mentally unstable. And during that
16 deposition, in the men's room, Mr. Hayes came in, just
17 completely after, off the record, and said to Mr. Rappaport:
18 This is the craziest stuff I've ever heard. For 40 years I've
19 done this. I've never heard anything as crazy as what Mr.
20 DeBenedetto has just said. The basis for smearing Mr. Walsh,
21 Mr. Robert, is Mr. DeBenedetto's testimony.

22 And like I said, when we were going through this, we
23 looked at the statements that the defendant raised saying that
24 Walsh Securities either participated in or knew about the
25 fraud. And what we had said is: A, we don't think the

1 statements should be given any credence; and B, based on the
2 law in New Jersey as it's existed for the last 14 or 19 years,
3 the central part of this fraud was these properties could have
4 been purchased by Cristo. They could have been appraised by,
5 if they had been repaired and fixed up, straw buyers could have
6 been brought in to get their credit history. But the two key
7 players that made this fraud possible was Coastal Title Agency,
8 the titles company's agent, because without Coastal, they never
9 would have issued -- they're never would have been a closing
10 protection letter issued to Walsh Securities. Without that
11 CPL, Walsh Securities would never have wired its funds to an
12 approved agent to the title companies that it didn't know or
13 chose. The two approved agents in this case, your Honor,
14 Stanley Yacker, Anthony Cicalese, both of them have said they
15 knew there was a fraud, and I'll go through it, based on the
16 fact that the fraud title companies therefore harmed Walsh
17 Securities. Under the law, title insurance in New Jersey, we
18 believe we're entitled to partial summary judgment on these
19 properties that Walsh repurchased.

20 And then, your Honor, when we were going through the
21 defendants' papers, it seems that some of their arguments are
22 rehased by those raised and considered in Sears Mortgage and
23 Client Protection Fund, or by the New Jersey appellate court in
24 Vision Mortgage. Other ones seemed to be cobbled together or
25 don't really address Walsh Securities at all. When you step

1 back from them, were kind of like two ships in the night.

2 And one of the points I wanted to make clear to the
3 Court, when we did a thorough review of the opposition briefs
4 submitted by both sets of defendants and, your Honor, just so
5 the record is clear, Commonwealth Title is now owned by
6 Fidelity Nations. And during the on-going fraud, there were
7 three title companies involved, Nations and Fidelity, which
8 then merged back, I believe, in 1998. And then Commonwealth,
9 Commonwealth has since been acquired -- all three title
10 insurance companies are under the same umbrella now.

11 We got two opposition briefs, and Nations and Fidelity
12 took some arguments --

13 THE COURT: I don't know if you're lumping the title
14 companies' briefs together. You're relying, each one relying
15 on the others.

16 MR. MAGNANINI: And one of the things we had, nowhere
17 in the title company opposition briefs do they address Walsh
18 Securities' argument that pursuant to the Vision case, the New
19 Jersey appellate court case saying it's not just enough to have
20 a first lien position, the lender has to get the three things
21 it bargained for: A bona fide purchaser with an ability to
22 make payments; and the purchaser who you can pursue a
23 deficiency If you're forced to foreclose. Like Vision,
24 neither of those -- I was going to say revenue or remedies that
25 are available to Walsh Securities. So what we get in

1 opposition is not a legal argument but the statement that title
2 companies road around vision, that they changed the closing
3 protection letters, and therefore the cases that proceed it,
4 Sears Mortgage, Client Security Fund, and Vision, itself, are
5 inapplicable because the closing protection letters are
6 different.

7 And as I said, your Honor, when you went through all
8 of the paper that was in there, one of the things we raised,
9 your Honor, 56.1 is just a side procedural note. The 56.1
10 statement we think was improper. What the rules allow is that
11 you can file your statement of undisputed facts, and any
12 non-moving parties file a statement that says it's either
13 disputed or not disputed. If it's disputed, it puts its cites
14 in, and the non-moving party gets to put it its undisputed
15 facts. That is a provision that allows for the moving party to
16 then dispute the undisputed facts of the non-moving party.

17 This is an issue we had raised with the defendants,
18 but they said they weren't going to withdraw their things. We
19 suggested that the Court not rely on any of their disputed
20 facts or the undisputed facts of the non-moving parties. When
21 we go -- a convoluted statement. I apologize, your Honor.
22 When we go through the papers that they have, there was
23 numerous cites to Mr. DeBenedetto and various other people,
24 that Robert Walsh, James Walsh, knew about or had some
25 involvement in the fraud, or their sister Betty Ann knew about

1 it. What their brief is completely lacking in is any statement
2 that they were even closing attorneys involved. The closing
3 attorneys are their approved agents.

4 THE COURT: And as I understand it, they rely on early
5 extensive statement as undisputed facts, which lays out the
6 fraudulent, I guess that maybe the supplemental statement of
7 disputed material facts filed pursuant to local Rule 56.1,
8 which goes through a great deal of detail as to each alleged
9 participant in the fraud. And doesn't this at least create an
10 issue of fact?

11 MR. MAGNANINI: It was calculated or couched as
12 disputed facts. But then at the end of -- I think it was
13 Commonwealth's brief, they said, based on everything that's
14 gone before us, we're actually entitled to summary judgment.
15 And so it didn't appear on certain of those facts that are in
16 there, that is lots of them too is kind of -- they are cherry
17 picked, we had to go back and say: Wait a minute, where is
18 this from? Get the two pages before it, get the three pages
19 after it. It's a very kind of narrow view to lay out -- what I
20 said was, just like a smear campaign, because some of the --
21 some of what you need to do, when you lay out material facts,
22 is make them material.

23 What was the relevance or what was the reason Walsh
24 Securities would: A, undertake this fraud; or B, know about it
25 and not do anything? There's a whole series of things that we

1 had raised in our papers which was -- and one of the things
2 that Fidelity's brief is just incorrect on is they say that the
3 fraud actually started in April of 1996.

4 Throughout this case we've said the fraud began in
5 February of 1996. That was the first of these properties that
6 were part of the fraud involved in -- the reason Fidelity
7 doesn't want to acknowledge there were sales in February and
8 March of 1996, is because Walsh Securities did not exist at
9 that point. Up until April 16th of 1996, Walsh Securities was
10 only owned by Grundel Financial. It was a subsidiary of
11 Grundel Financial.

12 On April 16th, 1996, Robert Walsh purchases the entity
13 in an LBL leverage buyout with his partner, Leverage Capital.
14 They set up Walsh -- one of the things that is not laid out as
15 material fact is any explanation why the fraud began in
16 February and March. What benefit did it have to Walsh
17 Securities, or to Mr. Walsh, other than if you can believe the
18 argument that the defendants have adopted from various criminal
19 defendants who sought a 5K letter, the argument is, Walsh was
20 trying to expand its portfolio of business so therefore it
21 could sell itself. And that's the simplistic argument that's
22 raised. But, again, the material questions of fact that should
23 have been raised was why was the fraud again in February, if
24 Walsh knew about it or was involved in it? The only reason
25 was, so that Mr. Walsh could pay more money for the company he

1 bought.

2 The second question that's never explained by anyone
3 is, why would Walsh participate or know about and not stop a
4 fraud that took 24 million dollars of its money and gave it to
5 complete strangers? There's no evidence anywhere that Mr.
6 Kane, Mr. Grieser, and that any of these people knew the -- the
7 people who received the money, Pepsny, Yacker, Cicalese, and
8 somehow Walsh either constructed a fraud, or acknowledged a
9 fraud, and let it go forward. That took 24 million dollars
10 from it and gave it to complete strangers. No reason.

11 Now, again, your Honor, another big point here is that
12 the reason they claim that Miss DeMola, and Robert Walsh, and
13 James Walsh, participated or knew about the fraud was to
14 increase the volume of Walsh so that it could be sold. Walsh
15 Securities had a number of sale offers prior to this time. And
16 if Walsh Securities really wanted to increase the number of
17 loans it was doing, Mr. Walsh testified in '98 in this case,
18 Walsh Securities was getting two thousand loans a month. And
19 of the 2,000 loans a month. It rejected approximately one
20 thousand, and underwrote one thousand. If it really needed to
21 increase its numbers, what it would have done was simply take
22 more risks on 10 loans, underwrite 10 more loans. Why again
23 participate or construct a fraud to give 45 million dollars to
24 people you don't know, and leave you on the hook for the fraud?

25 And the other thing that's very interesting, when you

1 look at the number of loans, your Honor, which again began
2 February of '96, they kind of ramp up. There's a lot of loans
3 done in January, '97, and there's only six loans I believe done
4 between February and March of 1997. Now, Walsh Securities and
5 the Walsh family had a real motivation to sell their company.
6 It was February and March of 1997. Because RBMG, Resource Bank
7 Mortgage Group, was doing due diligence on Walsh Securities.
8 They were looking at the numbers in order to come up with a
9 prior price to purchase Walsh Securities. So at a time when it
10 could have most benefited Walsh Securities, only six loans are
11 done. And is that because Walsh Securities said something?
12 No. The reason there's only six loans done is because up until
13 January of 1997, Mr. Kane has used Mr. Yacker to do his
14 closings. At that point Mr. Yacker has not filed hundreds of
15 documents relating to deeds, mortgages, joint venture
16 agreements. Nothing has been filed. So with nothing on file,
17 Mr. Kane says: We need to file these because Mr. Agel is
18 pushing him, saying: I can't issue title policies, and nothing
19 has come through.

20 Mr. Kane at that time who, like I said, controls, or I
21 will say controls Mr. Yacker's trust account, takes \$50,000
22 from Mr. Yacker and gives it to Mr. Cicalese to pay title
23 companies agents to go ahead and file all these documents. Mr.
24 Yacker and Mr. Kane are in a dispute about this \$50,000 Mr.
25 Kane has taken from Mr. Yacker's trust account, which has

1 caused him to bounce checks, and has caused an ethics
2 investigation against Mr. Yacker. At that time they're
3 changing over and they're switching now to Mr. Cicalese to get
4 him to close loans. And so the time when this was most
5 relevant to Walsh Securities so it could sell itself, there are
6 only six loans put through.

7 And one of the next issues that the Court needs to
8 look at, again, there is no evidence anywhere that if the Walsh
9 Securities family knew about this fraud, why would they sell
10 the loans to the whole loan buyers or put them in a security?
11 Nothing that these loans were the product of fraud. As long as
12 the fraud continued, the defendants would have made payments on
13 the loans. So the fact that once Walsh sold the loans, or put
14 them in securities, as I told your Honor earlier, Walsh was
15 forced to repurchase the mortgages because the 60/40 joint
16 venture, beyond anything else, put them into default.

17 And then two other things that was -- there was some
18 citation in one of the reply briefs to the transaction between
19 Walsh and RBMG to two of the provisions that wasn't cited. One
20 is that pursuant to the agreement, ten percent of the purchase
21 price was going to be escrowed by RBMG in case of any fraud or
22 loss of Walsh Securities. If Walsh knew about the loans, why
23 sit agreeing to put 42 million dollars into an escrow that's
24 going to have to be used to pay for the 24 million dollar fraud
25 loans which people, completely unrelated to Walsh, are going to

1 walk away with this money?

2 And the next thing is, if the Walsh family knew about
3 the fraud, why did they consent to getting restricted stock and
4 agreeing to work for RBMG's knew entity? It's going to be
5 called Walsh Securities for five years. This wasn't like a
6 Crazy Eddie merger blowout where they created the inventory.
7 Walsh's family was including Mr. Robert Walsh, the president;
8 Mr. James Walsh; and Mr. Moda, were all going to be employees
9 at the new entity. And for five years their stock was going to
10 be restricted. And so -- since none of those issues which
11 really would go to any of those things could be answered in the
12 affirmative, there was a reason that Walsh started the fraud
13 before it bought the company, or that Walsh was happy to give
14 away 24 million to strangers instead of simply underwriting
15 more loans that it was turning down or that Walsh didn't care
16 about 42 million dollars, or that somehow the purpose of this
17 fraud was to make Walsh more valuable during the very time that
18 the diligence was being done by the entity --

19 THE COURT: This 20 million dollars, was that Walsh,
20 that they put into the venture?

21 MR. MAGNANINI: The 24 million dollars was the money
22 Walsh wired to the approved agencies to close all the fraud
23 loans.

24 THE COURT: All right.

25 MR. MAGNANINI: So they gave their money away. If the

1 fraud was to be believed that it was set up and operated by the
2 Walsh family, they're giving money to people they don't even
3 know. And when you go back through all the various statements,
4 and --

5 THE COURT: The 24 million dollars come from -- where
6 did the 24 million dollars come from in the first place?

7 MR. MAGNANINI: That's money they received from
8 Greenwich Capital. They were the -- what they call the
9 warehouse line. So they gave Walsh Securities money to buy it
10 out, and Walsh Securities was in the LBL, for Robert Walsh to
11 buy it from Grundel Financial, and they remained as the
12 financial warehouse line. They were to receive 25 percent. So
13 at the closing they would have gotten 105 million dollars.

14 And then what we've shown, and I think when you go
15 through -- when you go through the -- if you -- like I said,
16 God bless your clerk for having to parse through this morass of
17 stuff. If you get down to this, there's no real evidence that
18 Robert Walsh knew about this. There's no evidence at all that
19 he got anything of value. There's no evidence of value that
20 James Walsh knew about this.

21 Mr. Calanni makes a statement that he told Mr. Walsh
22 to use a certain kind of an appraisal. And when we went back
23 through Mr. Calanni's appraisal, not only the net worth
24 approach but two other approaches are used on each of these
25 appraisals, and on a number of appraisals, the net worth

1 approach, which is supposedly suggested by James Walsh to Mr.
2 Calanni to increase its value, actually produces the more value
3 on the property than the other two methods Mr. Calanni uses.
4 And, again, other than I think Mr. DeBenedetto's, which is
5 completely incredible, testimony about Robert Walsh, there's
6 nothing to show that he received anything of value, and knew
7 about this, or benefited in any way.

8 Similarly, Miss DeMola, who everybody and their mother
9 blamed, her job was the national sales manager, to get in
10 everyone she could. So all of the defendants cite, she must
11 have known about this. And when you go through --

12 THE COURT: She was indicted.

13 MR. MAGNANINI: She was indicted, but not related to
14 this, your Honor. And she was re -- indicted for, and if you
15 read through the indictment, none of what she did is actually
16 criminal. And it's related to an unrelated set of loans which
17 people bought properties from Mr. Kane, and the properties were
18 in unfit condition to move into. So her plea, which
19 continually gets mixed in here, is completely unrelated to this
20 fraud within these properties.

21 And the other thing, when you get to -- when you look
22 at what she's pleading to, and what's being suggested, she's
23 saying -- and the plea is that she had some constructive
24 knowledge that things were going on that was improper. That
25 supposedly loans were being closed without written appraisals,

1 and there were various other things happening. And nowhere
2 does she admit -- and nowhere does anybody say: We paid DeMola
3 money. DeMola signed fake documents. All of the things that
4 we found out that Mr. D'Apolito and Miss O'Neill did, all
5 things which benefited them, to -- at a cost to the
6 corporation, none of those happened with Miss DeMola. She was
7 simply somebody who must have known what was going on, because
8 Mr. Kane talked to her, or Miss O'Neill said she saw her taking
9 documents out of a folder, or she did something else. Nowhere
10 in there does anybody have her, you know, doing anything to
11 advance the fraud, or doing anything, accepting any payments,
12 or anything like that.

13 Completely different than we have Miss O'Neill and Mr.
14 D'Apolito. Each of them -- actually Miss O'Neill denying she
15 gets any money, and Mr. D'Apolito paying her, both of them
16 saying she was demanding more money. Mr. D'Apolito comes out
17 and admits that he paid her 10,000, 20,000 to bring the
18 paperwork in. And if there was a problem with the loans, Mr.
19 D'Apolito, as a sales manager, would say -- he would fill out
20 the loan application, or Miss O'Neill would fill it out. So
21 that you have two low-level employees who were terminated as as
22 a result of the participation in the fraud, completely distinct
23 from Robert Walsh, James Walsh, or Miss DeMola.

24 And then, I think, your Honor, if you look through
25 what we've laid out about the agents of the title companies, is

1 that that Coastal Title, it's admitted, issued the closing
2 protection letters, the commitments, and the title policies on
3 behalf of the title insurance companies. They also received
4 money from each of the closings. Walsh Securities' funds that
5 it wired to the approved attorney, Yacker or Cicalese, and it
6 admitted the funds to the title insurance companies. It's also
7 acknowledged both from the title insurance companies and
8 everybody else who's been deposed, without the closing
9 protection letter, either Walsh or someone else would have
10 wired its funds to the approved attorneys. And when you go
11 back to client security in Sears, the closing protection letter
12 in New Jersey, your Honor, is considered part of the coverage
13 provided by the title insurance.

14 And even more specifically, when you go to the --
15 there's one difference with the closing protection letters.
16 Commonwealth does not have a paragraph F. The Coastal Title
17 has a paragraph F. When you look at Nations' and Fidelity's
18 paragraph F, the last sentence says: Any payment under the
19 title insurance policy will constitute a payment under the CPL.
20 So under their plain reading of their document, the closing and
21 protection letter is part of the title insurance policy
22 coverage.

23 And then one of the other things Coastal admitted to
24 doing is it provided Walsh title commitment. Without title
25 commitment, Walsh Securities would not have gone forward with

1 the loan, and would not have wired the money. The one thing
2 Coastal did here, which Mr. Agel said in 30 years of doing
3 business he has never done before, and he has never done since,
4 he issued two title commitments, one from Mr. Kane when he
5 purchased the property, and he used the same title commitment
6 number, and he paid a, capital A in parenthesis, and that was
7 sent to Walsh Securities. When you hold these two commitments
8 up, the one issued to Mr. Kane said: You don't own the
9 property. There's liens. There's tax liens, there's
10 foreclosures. There's taxes that haven't been paid.
11 Whatever's wrong with the title is listed on the commitment Mr.
12 Kane got.

13 On the commitment sent to Walsh Securities by Coastal
14 Title Agency, it's blank. There's nothing. It looks like
15 there's clear title. He said he did that after speaking with
16 Mr. Kane. He's never done it before, and never done it since,
17 thinking that there wasn't any sort of title problem with the
18 properties.

19 Mr. Agel said in his deposition, which we cited to,
20 throughout the process of Mr. Kane buying properties and
21 selling them, he regularly consulted with what he called the
22 underwriters, sometimes employers, and sometimes not. One of
23 the persons we depose, Nancy Cook from the title companies, Mr.
24 Agel consulted with them on an almost daily basis because he
25 said there were so many problems with the properties, so the

1 title companies, unlike we say Walsh Securities, had knowledge
2 that this was going on throughout the case.

3 And the next thing he did, he said he accepted a
4 \$50,000 payment from Mr. Kane, and a \$50,000 payment was used
5 to clear up the title issues and other problems like that.
6 But -- and the other thing Mr. Agel did and, again, your Honor,
7 I said I've never done it before and I've never do it since, he
8 took hundreds of these documents that he said Mr. Yacker had
9 not filed and he filed them. And he filed the 60/40 deeds
10 ahead of the mortgage.

11 And as Mr. Sullivan, the corporate representative from
12 the title companies says, that seems to indicate that we should
13 cover this loss, never mind the bona fide purchaser, never mind
14 there's actions, there's no first lien here to Walsh Securities
15 because of the actions of their title agent.

16 And then the last thing Mr. Agel says at his
17 deposition was, at the end of the fraud, a bunch of title
18 documents and deeds were stacked up on his desk. Once the
19 fraud was uncovered, he never filed those. So there's a number
20 of documents at Walsh Securities that were of these properties
21 that were never filed. So Walsh again is damaged by that, your
22 Honor.

23 And then, your Honor, we also had pointed out in our
24 facts that there was two closing lawyers involved. I got
25 Yacker, and I got Cicalese. Yacker admits he's involved in the

1 fraud. He pleads guilty, directly involved in the fraud, and
2 is sentenced to prison. He uses Lorraine King to do the
3 closings. He admits: I didn't even do these closings. I know
4 I'm a lawyer, but I had other things -- closing for paralegal.
5 She did all the closings. My trust account was a mess. I let
6 Mr. Kane buy me a computer, and Mr. Kane ran my trust account.

7 And then they said the criminals need a 60/40 joint
8 venture. Mr. Yacker provides that.

9 And the other thing that Mr. Yacker does, your Honor,
10 and like I said, Mr. Yacker in his deposition, very
11 Clintonesque, he holds up a check in his hand and he signs it
12 as the escrow letter. So when he sends escrow letters to Walsh
13 Securities, Mr. Yacker says, "I'm holding a check in escrow,"
14 he physically is holding the check in escrow. It is not made
15 out to Mr. Yacker's trust account. It's not made out to any
16 amount. He physically holds a blank check and sends letters to
17 Walsh Securities, that they used in their underwriting process,
18 and says -- as I said, your Honor, once there's a dispute
19 between Kane and Yacker, they bring in Mr. Cicalese. He's a
20 brand new lawyer. He doesn't have a client base. He knows Mr.
21 Grieser. He's glad to do the closings. What he says is: I
22 have a paralegal that I partner with. We'll take care of the
23 closings. What he's told by Mr. Yacker is: You use Lorraine
24 King, or you won't get the closings. Mr. Cicalese says: I
25 knew this was a fraud. He says none of the -- by the time Mr.

1 Cicalese was involved, your Honor, none of the straw buyers
2 even show up. He says: I know other people are signing for
3 these documents. I know that the properties are being sold to
4 straw buyers. And Walsh Securities' money is being used to
5 close that deal. But Mr. Crane doesn't even own the
6 properties. He said that, you know, I know Miss King was being
7 paid by Mr. Kane to do the closings. And then he says he did
8 two things that Mr. Yacker did exactly. They both violate
9 Walsh Securities' closing instructions, not on any kind of the
10 small things, the big thing about the closing, HUD 1 Yacker and
11 Cicalese sends back. It shows where the money is going. Both
12 Yacker and Cicalese says Kane has to purchase the property.
13 I'm going to take a ton of money, and then I'm going to send a
14 chunk of money to Mr. Grieser, and then I'm going to send a
15 chunk of money to Mr. Kane as his profit, and then I'm going to
16 send money to me, and I'm going to pay Lorraine King.

17 And the last thing that they both do is they send the
18 money to Coastal Title to pay the -- that's the violation of
19 the closing instructions. And like I said, when you look at
20 what the defendants have admitted, they provided the title
21 insurance coverages. They provided the CPLs. And unless the
22 Court is going to buy the defense that they wrote around Sears
23 and Client Protection, and they wrote around the Vision case,
24 that they're liable under existing New Jersey law, particularly
25 because, as I said, Walsh did not get what it bargained for.

1 And, your Honor, one of the things the title company
2 keeps bringing up, and the ships in the night business, they
3 keep telling us that we need to prove that each and every
4 transaction was a fraud. Yet, when you read the 56.1 statement
5 of facts, nowhere in there does it say that Robert Walsh knew
6 that the 606 Fifth Avenue in Asbury Park, or Mr. Mullen knew
7 that 1113 Asbury Avenue in Asbury Park was a fraud, or that
8 property in Long Beach or Long Branch was a fraud.

9 So, again, what you get is Walsh Securities should be
10 forced to prove that every transaction individually was a
11 fraud, and however they're allowed to defend by saying, people
12 at Walsh, they're without the fraud. And one of the things
13 that you get to, your Honor, when you go through their papers
14 is, and our papers is, all these transactions were alike. Kane
15 buys a property, and an appraiser says it's worth it, and a
16 strawbuyer gives credit, and Coastal Title issues a CPL, title
17 commitment, Walsh wires money, and the money is distributed to
18 the RICO enterprises, and it's paid for title insurance
19 protection, and also paid for the CPL.

20 Now, I'll say certain properties are different, but
21 the basic fracture is the same. And when you look at New
22 Jersey district law here, Judge Sheridan was faced with the
23 same situation in the Chan case. And you can't rule on this,
24 your Honor, because it's a class action, because all of these
25 title policies are individual instances. And judge Sheridan

1 said, as a matter of fact, I can rule on multiple title claims,
2 and also the closing attorney is an agent of the title
3 companies.

4 Judge Linares is faced with a similar situation in
5 American Home Mortgage. There's multiple closing protection
6 letters. And he finds he can make a decision on multiple
7 closing -- and he finds the same thing that everybody else has
8 found, that is that the approved attorneys are the agents of
9 the title companies and their actions bind the title companies.
10 And the title companies are in the best position to prevent the
11 defalcation or fraud by the closing attorneys. And then that
12 is, your Honor, the basis of the Sears, Clients Protection and
13 Vision, and the center piece of title law in New Jersey.

14 And just to -- we were following up on this, there's
15 another case, 2010 Lawyers Fund case, and in that case, even
16 though ostensibly the title companies wrote around the closing
17 and protection letters, the 2010 Lawyers Fund finds the same
18 thing, that the approved attorney is still the agent of title
19 insurance company. And so what we got from the title insurance
20 companies is that they want to say: Look at Walsh Securities
21 and the individuals within it, all of the acts of the
22 individuals are attributed to agency of Walsh Securities.
23 However, when it comes to us, don't look at the acts of the
24 closing lawyers, and none of that should be attributed to us.
25 And we're saying it's got to be -- it's got to be one or the

1 other. This is my ships in the night. What's good for them is
2 apparently not good for anybody else.

3 And one of the other defenses, I'll just hit their
4 defenses quick, your Honor, Walsh is in the shoes of National
5 Home Funding. We dispute that National Home Funding, Mr.
6 Kane's involvement, using their paper, and so. But as your
7 Honor saw that we laid out in the papers, we believe Walsh is a
8 holder in due course, and paid good money at the closing, and
9 that's a table funding, so Walsh got a negotiable instrument
10 that it was in fact able to turn around and close, or
11 securitize, and so in our defense, and we think it's a valid
12 one to anything there, NHF is an assignee, Walsh was a holder
13 in due course.

14 And, again, as I said throughout this process, one
15 thing is clear, Mr. Yacker, and Mr. Cicalese, and Mr. Aiker was
16 involved up to their eye balls. And Mr. Yacker is having
17 constant conversation with the title companies. And then --
18 let me skip that. And then, as I said, your Honor, when you
19 have to parse through the facts, there's nothing in the facts
20 that they present that shows that Mr. Walsh, either James or
21 Robert, or Ms. DeMola, were given any sort of consideration,
22 participated in this fraud, and were involved in any way. And
23 as I said, the basic premise of their theory was that Walsh
24 participated in this to expand its volume, falls when you look
25 at the actual facts of what was done.

1 And then, as to Mr. D'Apolito and Miss O'Neill, we
2 admit that they were involved in the fraud. We fired them. We
3 went to the U.S. Attorney and they were both sentenced for
4 involvement in this fraud. But when you look at Judge Hayden's
5 decision in the Siemens case, it's based on that old line of
6 commercial paper cases, the teller cases, somebody at the
7 bottom is participating in the fraud to rip off the bank, it
8 doesn't preclude the bank from getting any recovery on any sort
9 of fidelity bonds. Their actions cannot be imputed from
10 Walsh's corporation. And their actions as defendants lay out,
11 were merely for one purpose, to line their own pocket. No
12 benefit to Walsh Securities. And, in fact, it costs them the
13 fraud.

14 Defendants also threw in, your Honor, at the very end,
15 this in pari delicto defense. This came out of the Bondi cases
16 that was published December 22nd, the day before the briefs
17 were filed. And when I read that, I wasn't quite sure, when
18 you read Bondi, in pari delicto was an affirmative defense that
19 was argued through trial, and it was put on through Judge Haris
20 in Bergen County. And I went back and looked at affirmative
21 defenses, failure to state a claim, laches, and estoppel,
22 waiver and step into the shoes of NHF, nowhere in there is in
23 pari delicto.

24 We went through Nations Fidelity. The interesting
25 thing about that is when you read what it actually is, it's

1 somebody else who's as liable to the plaintiff. And because
2 the Court doesn't want to benefit two wrongdoers, they rule for
3 the non-moving party or the defendant in that case. In order
4 for the defendants to be in pari delicto, they actually had to
5 participate in the fraud with Walsh, where they keep saying
6 they didn't, and Walsh has never alleged -- that agents were,
7 and their actions should be imputed to them. But at the of the
8 day, what I -- you can glean from them is in order to raise an
9 in pari delicto defense, they have to admit that they're
10 tainted with the acts of the agents, Mr. Yacker and Mr.
11 Cicalese, approved closing arguments, and Coastal Title, and
12 that's why their hands are unclean as well.

13 But I think when you look at it, it brings you back to
14 the same basic position that we started, which was, in a
15 situation where there's a loss in this case to a lender because
16 the borrowers had no loss, who does the loss fall on? Who is
17 in the best situation to avoid that loss? That is, according
18 to the New Jersey Law, is the title companies. And at that
19 time --

20 THE COURT: Your 45 minutes.

21 MR. MAGNANINI: I've taken all the my time, I
22 apologize.

23 THE COURT: We'll take a 10-minute break to give my
24 court reporter a release from that rapid machine gun fire
25 presentation. All right. So we'll resume at five after.

1 (Recess)

2 THE COURT: Now, the defense proposes to allocate its
3 time, your 45 minutes.

4 MR. HAYES: Judge, I don't think I'm going to need
5 even twenty minutes, and Mr. Kott should have enough time.

6 THE COURT: You can split it up as best suits your
7 purposes.

8 MR. HAYES: Thank you, sir.

9 Good morning, your Honor. My name is Ed Hayes. I
10 represent Fidelity and Nations in this case. Judge, I always
11 have a problem understanding how a party thinks they're
12 entitled to summary judgment when they spend two-thirds of
13 their argument talking about the facts of the case.

14 The facts of this case, which for purposes of summary
15 judgment must accept as facts and draw all the reasonable
16 inferences, chose that the Walsh family was involved in this
17 case. This was not a case like Sears or Vision or Clients
18 Security Fund. We have a blameless victim. This is a case
19 which showed at a minimum that Walsh was aware of what was
20 going on, and more likely we believe was directly involved and
21 participated in the frauds.

22 Mr. Magnanini said: Why would they do this? That's a
23 jury argument to ultimately make. To say the jury won't
24 believe those facts because why would they do this? Let me
25 just address one of the questions that Mr. Magnanini raised.

1 First, why would they give away 24 million dollars in these
2 loans? Well, the bottom line, Judge, is the way Walsh worked,
3 Walsh didn't give away anything. They would fund these
4 particular loans with the monies that were obtained from their
5 warehouse credit line. And within a very short period of time,
6 sell those loans on the secondary market making a handsome
7 profit. Yes, it was ultimately funding loans, as does any
8 lender in the mortgage business, but ultimately that money
9 comes back to it from the third party whole loan purchasers
10 from the securities. Why else would they make all those loans?
11 They made these loans because they were increasing the value of
12 the business.

13 There was testimony from several witnesses in this
14 case that these loans were all about increasing the book of
15 business that Walsh had, so that it would make it both a more
16 attractive merger candidate as well as an entity that RBMG
17 would pay far more money to. There are lots of explanations in
18 this case, Judge, as to why Walsh would do the things that they
19 do. And ultimately we believe that it would be for the jury to
20 decide whether or not those explanations are acceptable. But
21 the bottom line is, the facts in this case, Judge, when viewed
22 in the light most favorable to us, are overwhelming that the
23 Walsh family was involved in this. And is not the innocent
24 victim that Clients Security Funds, that Sears and that Vision
25 had.

1 Now, not only is the evidence overwhelming, Judge,
2 that Walsh was involved in the fraud, but the evidence is
3 overwhelming that the mortgage broker, National Home Funding,
4 was also involved in the fraud. As your Honor has seen from
5 the paperwork in this case, these loans were made in the name
6 of the National Home Funding. The title policies were issued
7 to National Home Funding. The closing service letters were
8 issued to National Home Funding. Throughout its first four
9 complaints in this case, Walsh has made allegations that NHF
10 was intricately involved in this fraud, and in fact named it as
11 a RICO defendant in its filing. Your Honor has within the
12 record that Walsh submitted a claim on its blog in which it
13 alleged that NHF was indirectly involved in the fraud, and was
14 paid close to a million dollars under that bond because of its
15 allegations that NHF was involved in the fraud.

16 When Mr. Kott and I began to defend this case in part
17 on the basis that Walsh as an assignee stood in the shoes of
18 NHF, at that point in time the record miraculously changes.
19 Now Walsh is no longer sure that NHF was involved in the fraud.
20 Very shortly thereafter, Walsh entered into a confidential
21 settlement from NHF to get it out of this case. I would
22 respectfully suggest to your Honor that whatever its current
23 position, doesn't really matter because the evidence in this
24 case points to NHF's involvement in the fraud. And at a
25 minimum, we have the right to present that issue to the jury so

1 that the jury can make the decision whether NHF was involved in
2 the fraud.

3 In it's last response, Walsh contends for the first
4 time now that it is a holder in due course of this paper, and
5 that as a result it does not stand in the shoes of NHF for
6 purposes of determining whether or not its claim would be
7 barred for wrongful conduct.

8 There are really two responses to that, Judge. The
9 first thing, relatively simple, holder in due course, you must
10 in fact take an interest in the item being transferred in good
11 faith without knowledge of any problems in connection with the
12 document that you're taking. Again, going back to its evidence
13 in this case, which your Honor must consider as true for
14 purposes of this motion, Walsh knew exactly what it was getting
15 when it was taking these mortgages from NHF. It knew it was
16 getting loans from substantial problems that were the product
17 of fraud. More importantly, from a legal standpoint, your
18 Honor has already ruled on whether or not holder in due course
19 status applies to a mortgage under New Jersey law.

20 Your Honor in the case of SBA vs. Martin Label
21 analyzed the New Jersey statutes that dealt with assignments of
22 mortgages, and the interplay between New Jersey statutes and
23 the holder in due course doctrine. And the New Jersey statutes
24 specifically provides when a mortgage is assigned, it's
25 assigned with the burdens that that mortgage has from the

1 original holder of that mortgage. And in SBA, your Honor
2 decided that the holder in due course concept is not applicable
3 under New Jersey in connection with the assignment of mortgages
4 based on that New Jersey statute.

5 I respectfully suggest to your Honor that that holding
6 is just as binding in this case, that Walsh cannot hide behind
7 the holder in due course status. So I think, your Honor, based
8 on the mere factor alone that there are facts that had been put
9 into this record that show the involvement of Walsh, and the
10 involvement of NHF, your Honor must deny the summary judgment
11 based on that alone.

12 Your Honor, I heard a lot of argument from Mr.
13 Magnanini, and saw a lot of argument in their briefs about
14 agency and an agency theory. This case is not an agency case.
15 This case is a breach of contract case. We have not been sued
16 in this case for vicarious liability on the conduct of either
17 Coastal Title, or on the conduct of the closing attorneys.
18 This case, through its first three versions of the complaint,
19 was a breach of contract claim under the closing service
20 letters. Despite our protestations, a forth amended complaint
21 was allowed to add a breach of contract under the title
22 insurance policies. The question ultimately for decision in
23 this case is whether or not the conduct falls within the
24 language of the closing service letter, or within the language
25 of the title policies. The fact that the closing attorneys

1 engaged in fraudulent conduct is not attributable to us, unless
2 the type of conduct they engaged in is covered under the
3 contract, under the closing service letter. The type of
4 conduct that it's alleged Coastal Title engaged in is not our
5 responsibility, unless it's covered under the title insurance
6 policy, because the closing protection letters are not issued
7 for the conduct of Coastal, they're issued for the conduct of
8 the closing attorneys.

9 So I would suggest respectfully to your Honor that
10 this case is not about agency, it's about contract, and whether
11 or not the plaintiff has presented to your Honor evidence that
12 the contracts were breached in this case. The plaintiff's
13 position is simple, there was a fraud. The closing attorneys
14 were intricately involved in the fraud. And but for the
15 wrongful conduct of the closing attorneys, we never would have
16 funded these loans in the first place. Judge, that's not the
17 standard for your Honor's analysis in this case, a "but for"
18 standard. It gets back to this case is a contract case, and
19 can continue to establish that the requirements of the closing
20 service letters have been met in this case, and we respectfully
21 suggest that they have not.

22 Now, one of the other problems that we've had all
23 along in this case, Judge, is that Walsh has not presented to
24 your Honor for consideration in this motion any evidence,
25 evidence that it is even the holder of the mortgages about

1 which it, or through which it makes closing service letters
2 claims, or through which it makes title insurance claims. I
3 think you have to start with a fundamental proposition, Judge,
4 that in order to have standing to even bring these claims
5 before your Honor, Walsh needs to establish that it is the
6 current holder of the mortgages.

7 As your Honor knows from reviewing the paperwork,
8 these mortgages started in the name of NHF, that were
9 assignments to Walsh. Walsh assigned the mortgages to whole
10 own buyers in the secondary market or to securities. In order
11 for Walsh to make a claim, it has to have re-acquired those
12 mortgages. And the way in which one re-acquires a mortgage is
13 via assignment.

14 Your Honor saw in the certification that I submitted,
15 an indication of the assignments which are of record in
16 connection with at least the mortgages on which title claims
17 are submitted. And that record showed that mortgages are
18 currently held by either NHF, by an entity called Dougan
19 Partners, L.L.C., still by The Money Store, by an entity called
20 ERC7, but not Walsh. Now, one would have expected, your Honor,
21 when we indicated in our submissions that Walsh needs to
22 establish its standing to bring this claim, that Walsh would
23 have produced something within the record to show that it has
24 standing to bring this claim. And what the certification that
25 counsel submitted in response to my motion for summary judgment

1 on the title claims were copies of assignments from NHF to
2 Walsh, and then copies of assignments to Walsh into the
3 secondary market. It is yet to produce a piece of paper that
4 shows that it is the current holder of the mortgage and title
5 to bring the claim. As your Honor I'm sure is aware with all
6 the secondary market transactions that take place, it's a hot
7 issue today in the courts as to whether or not a lender has the
8 right to bring a proceeding when it be a foreclosure or a
9 claim. There is nothing in this record, Judge, that shows
10 assignment from either the secondary mortgage -- or its
11 secondary market purchaser or the securities back to Walsh.
12 And without that evidence, Judge, I think it would also require
13 that you dismiss their claim for lack of standing.

14 As to Sears, and Vision, and Client Security Fund,
15 again, the argument on the part of the plaintiff is, there was
16 a fraud. We would not have made the loan but for the fraud.
17 And you're responsible, because Sears, Vision and Client
18 Security Funds say that, your Honor.

19 Well, we don't believe it's that simple, Judge.
20 First, the Sears case was not a closing service letter case, as
21 your Honor is aware, it was an agency case. And it was a
22 question of whether or not the wrongdoer in that case, whether
23 his conduct would be charged to the title company under a
24 parent agency theory. And, in fact, the Sears court said that
25 the title company in their case was responsible under a parent

1 agency theory for the conduct of the wrongdoer. When we come
2 to Client Security Fund, we in fact have a closing protection
3 letter. It is a closing protection letter case. However, as
4 much as counsel for plaintiff would like to have us ignore the
5 language in the letter, it is different than the letter that
6 existed in this case. Both Client Security and Vision
7 Mortgage, your Honor, had a closing service letter which
8 provided as follows: That the title underwriter would
9 reimburse the lender for actual loss when such loss arises out
10 of fraud or dishonesty of the issuing agent or approved
11 attorney in handling your funds or documents in connection with
12 the closing. So fraud or dishonesty in handling your funds or
13 documents in connection with the closing. Both the Client
14 Security Funds court and the Vision Mortgage court construed
15 that language very broadly and said: Title companies, in those
16 cases, we had a situation where the fraud occurred either in
17 connection with the handling of your funds or in connection
18 with the closings. Because that expanded dramatically the
19 liability of a title company in New Jersey. The title company
20 did in fact make revision to the closing service letters which
21 were in place at the time of all these transactions. And those
22 revised letters were approved by the New Jersey Department of
23 Insurance. And what those letters provide, Judge, is that loss
24 will be indemnified if the loss arises out of failure of the
25 issuing agent or attorney to comply with your written closing

1 instructions. And then there's a modifier, to the extent they
2 relate to the title -- to the interest in the land or the
3 validity, enforceability and priority of the land, and the
4 mortgage, or the disbursement of funds necessary to establish
5 the title or lien, or in connection with the collection and
6 payment of funds due to you. So we took a very general letter
7 that was in existence under Client Security Fund and Vision,
8 and limited the situations in which the liability would exist
9 under that letter.

10 There's another paragraph that talks about fraud or
11 misapplication of the closing attorney in handling funds, but
12 again a modification in connection with the matter set forth in
13 the prior paragraph which I just read.

14 So there's no question that the title industry has
15 attempted to ride around the liability that existed in Clients
16 Security Fund and Vision Mortgage. And we believe that this
17 language, Judge, under New Jersey law where the courts say the
18 entirety of an instrument is to be looked at, that this in fact
19 changes the landscape upon which one would make a liability
20 decision.

21 Now, counsel argues: Well, that hasn't worked. And
22 they cite you, I believe, the Stewart Title case, where the
23 Court still found liability under the new letter. But what the
24 Stewart Title case focussed on when referencing the fact that
25 the letter had been amended, said that although the letter was

1 amended, it did not address the question of whether or not a
2 limitation letter was sent directly to a victim. The letter
3 had been modified, and the agency had been modified, but there
4 was no evidence that in that case the limitation letter which
5 arose out of Sears, which says this individual was not our
6 agent, was ever sent to the victim. All the Court said in that
7 case, Judge, was: You changed the letter, but I don't think
8 you've addressed the question which I've raised, which is was
9 the victim aware of limitations on the liability here?

10 Judge, we have a different letter. You've heard
11 nothing from the plaintiff in this case as to how the conduct
12 fits within that modified language. In all of its submissions,
13 it's referenced that language only once, when it initially
14 identified the language of the letter. There's been no
15 analysis given to whether or not the conduct in this case falls
16 within that letter.

17 Now, it's interesting, your Honor, here's about 66
18 mortgages of 220 some mortgages that Walsh has repurchased.
19 But it broad brushes and says: Every one of these loans were
20 fraudulent. Well, Judge, what about the other 160 some loans
21 that were the subject of this fraud? Why have they not been
22 repurchased? Was there a demand for repurchase? Have those
23 mortgages been paid? Were they refinanced? All issues of fact
24 ultimately that the jury's going to have to look at in this
25 case.

1 We would respectfully suggest to your Honor that these
2 cases are not all the same. There is testimony that
3 distinguished the cases at trial regarding how disbursements
4 were made. There was testimony regarding the manner in which
5 the fraud was conducted. And the fact is that they've only
6 repurchased 66 of the 200 loans in this case. I would suggest
7 to you a reasonable inference from that fact, Judge, is that on
8 the other 166 loans that were not problems, or if there were
9 problems they were not sufficient to create issues for the
10 holder of those loans, several of which in fact foreclosed
11 their mortgages.

12 Lastly, Judge, if I may just address the extent to
13 the motion for summary judgment is making an arguments on the
14 title claims, and it ites in with our motion on the title
15 claims. Your Honor heard an acknowledgement by Mr. Magnanini
16 in the initial part of his argument that Walsh has collected
17 nothing from these mortgages because the mortgages were
18 divested by other foreclosure sales which took place after
19 Walsh had allegedly re-acquired these mortgages. We presented
20 our motion evidence that in fact there are no assignments of
21 record to Walsh, and that's why Walsh did not receive notice of
22 these tax sales that took place. It's mortgages were divested,
23 not because there was a defect in the mortgage, its mortgages
24 were divested, not because of these joint venture deeds being
25 reported out of order, mortgages were divested because of

1 foreclosure sales that took place. After these properties
2 closed, no one paid the taxes on the properties. The tax sales
3 certificates were sold, were foreclosed, and whatever liens,
4 including the Walsh mortgages, assuming they held it, were
5 requested.

6 There's not a bit of evidence in this case, Judge,
7 that Walsh has suffered any loss as a result of a title
8 problem. And, again, it raises the issue of these joint
9 venture deeds. Where is the evidence that Walsh could not
10 foreclose a mortgage because of the joint venture deed? Where
11 is the evidence that the order of recording precluded Walsh
12 from taking any action? We cited the Willow Ridge case in our
13 reply, Judge, which was a case where a buyer had purchased the
14 property, and there were material liens on the property which
15 were not excepted from coverage. A title claim arose as a
16 result of those. And then during the pendency of the title
17 claim, the property was foreclosed because its insured did not
18 pay its mortgage on the property.

19 The Court analyzed that case, and I think it's exactly
20 the situation which exists before your Honor. The Court looked
21 at that and said: Okay, there are material liens on this
22 property which were not excepted from coverage. Clearly the
23 title company has some responsibility for those. They're
24 covered, however, the loss in that case did not arise as a
25 result of the existence of the material in its liens, the loss

1 arose from the fact that the insured had not paid its mortgage,
2 and its rights were divested. What the court said in that case
3 is that: You had a title claim, you must not only prove
4 coverage under the policy, but you must prove the loss. And
5 the loss in their that arose from the foreclosure of the first
6 mortgage, not from the problem that existed in title.

7 I would suggest, your Honor, that's this case. That
8 is this case. We don't deny the closing attorneys engaged in
9 wrongdoing. We don't deny that there were problems. What we
10 do deny is we created any records, is the conduct developed in
11 the loss -- all of those mortgages that they lost, Judge, they
12 lost because of tax sale foreclosures. They got no notice of
13 those tax sale foreclosures and were unable to protect their
14 interest because they didn't record the assignments. There's
15 an admission by the 30(b)(6) witness that they didn't record
16 the assignments.

17 So as I look at this case, Judge, you have a plethora
18 of evidence that NHF was involved in this fraud. You have a
19 plethora of evidence that Walsh was involved in the fraud. You
20 have no evidence that Walsh actually is in current title to the
21 mortgages about which it makes a claim. And you have no
22 attempt by the plaintiffs to set forth for your Honor evidence
23 that they can meet the limited language that's set forth in the
24 revised closing service letters.

25 We believe, Judge, that any one of those bases, alone,

1 and certainly all of them combined, are a basis upon which
2 summary judgment should be denied.

3 I know Mr. Kott wants to address the in pari delicto
4 issue and a few more.

5 THE COURT: All right.

6 MR. KOTT: Good morning, your Honor. David Kott for
7 Commonwealth.

8 THE COURT: Good morning, Mr. Kott.

9 MR. KOTT: Just a few things briefly before I get into
10 in pari delicto. With respect to National Home Funding, Robert
11 Walsh testified in his 30(b)(6) deposition that the mastermind
12 of this scheme was a man named William Kane. Kane is somebody
13 who was sued by the plaintiff in this case, and Kane was
14 sentenced to federal prison for this fraud. Kane was
15 associated with National Home Funding. So there is no fact
16 dispute about William Kane's involvement. The plaintiffs
17 acknowledge, and indeed the plaintiffs retained a default
18 judgment from your Honor against William Kane. He was someone
19 who originated the loans that the plaintiff is suing on.

20 Now we move to Walsh Securities. And we have five
21 employees involved there. We have three members of the Walsh
22 family, Robert Walsh, James Walsh, and Betty, and all officers
23 of the company, all shareholders of the company. And as Mr.
24 Magnanini argued to your Honor why they were not involved, I
25 thought he was facing the wrong direction. And what I mean by

1 that is, I thought he should have been facing in this
2 direction. Because his argument was entirely factual that they
3 weren't involved, despite the overwhelming proofs from which a
4 jury could reasonably conclude that they were aware of the
5 fraud. And, in fact, the proofs are not only oral testimony,
6 they're documents.

7 One of the documents, and we cite to it in paragraphs,
8 I think it's 66 and 67, our statement of facts, is a letter
9 addressed to James Walsh, dated January 31, 1997. And the
10 letter is from Greenwich Capital, which is the lender to Walsh.
11 And Greenwich Capital says: It has looked at 17 loans that
12 were originated by National Home Funding. This is January,
13 1997. And at the end of the letter, they talk about all the
14 problems they see. And at the end of the letter, the letter
15 addressed to James Walsh, it says: "Given the credit history
16 and life style of the borrowers, the fact of the deposit with
17 the attorneys were never verified as being the borrowers own
18 funds (or that the borrowers had any verified assets closed).
19 And the flip nature of the transactions, I believe there's a
20 good chance that these are no down payment purchase
21 transactions, and possibly are straw buyers used to facilitate
22 very large cash back transactions to Cristo Property
23 Management,

24 THE COURT: Cristo Property Management was William
25 Kane's company?

1 MR. KOTT: Yes.

2 THE COURT: Now, what are you reading from?

3 MR. KOTT: I'm reading from paragraph 67.

4 THE COURT: Sixty-seven.

5 MR. KOTT: Let me find it, your Honor. I believe it's
6 paragraph 67 of our statement of facts, 66 and 67. It's on
7 page 17.

8 THE COURT: Yes, I think I have it here.

9 MR. KOTT: Yes.

10 THE COURT: Page 17 of the -- supplemental statement
11 of disputed material facts.

12 MR. KOTT: Right. And now my point on that, Judge, is
13 any lender, honest lender, being told that they purchased 17
14 loans with no cash in the loans and straw buyers, would do a
15 couple things. They'd stop dealing with National Home Funding,
16 that's the first thing they would do. The second thing they
17 would do is be on the phone with either the FBI or the Monmouth
18 County Prosecutors and say: We've been sold a bunch of
19 fraudulent loans and we've been sold them by National Home
20 Funding. Instead, what Walsh did was absolutely nothing.
21 Indeed, they continued to purchase loans from National Home
22 Funding. All Mr. Magnanini criticizes is the quality of the
23 proofs. But the quality of the proofs are for the jury on a
24 motion for summary judgment. The documents in -- in Walsh's
25 own files demonstrate that Walsh -- Walsh, company, and if the

1 family members were aware of the fraud.

2 We have two other Walsh employees who I want to
3 address. One is Anthony D'Apolito, and the other is Kelly
4 O'Neill. And now we get into the issues of imputation. And
5 there are, fortunately for your Honor, there is New Jersey
6 authority that guides the way. The two cases are the Bondi
7 case, which was decided by the New Jersey Appellate Division on
8 December 22nd, 2011. It has been approved for publication, but
9 I don't have the New Jersey super cite yet. And NCP, which is
10 a New Jersey Supreme Court case at 187 New Jersey 353. And NCP
11 simply says, the black letter law, that a corporation is deemed
12 to know and deemed to be responsible for the acts of its
13 employees.

14 So under NCP, the knowledge of D'Apolito, and the
15 knowledge and the involvement of O'Neill, are attributable to
16 Walsh. And here again there's no fact dispute because Mr.
17 Magnanini, about an hour ago, told you that they were involved
18 in the fraud, and the fact that they had received cash
19 payments. That is an exception to the imputation rule, and
20 it's called the adverse interest exception. And that's
21 discussed in Bondi. Bondi and NCP aren't even discussed in the
22 plaintiff's cases. But under the adverse interest exception,
23 the employee has to, solely for his benefit, act adverse to the
24 company.

25 And with respect to D'Apolito and O'Neill, their

1 conduct, while wrongful, benefited the company because it
2 allowed the company to put additional loans on the book which
3 meant two things. The company was more profitable, and the
4 company had a higher value from which they could put itself in
5 play and be acquired by somebody. Bondi says that the fact that
6 the company goes bankrupt ultimately because of the wrongful
7 acts does not mean that the adverse interest exception does not
8 apply.

9 The plaintiff relies on a few different cases, the
10 Siemens case, which is a Third Circuit case, that was an
11 embezzlement case. The employee embezzled money from the
12 company. Well, there's no benefit to the company where the
13 employee benefit and wrongful benefit were from Kane and
14 Skowrenski. Skowrenski is the owner of National Home Funding.
15 The plaintiff argues that the question is a question of intent:
16 Did the employee intend to benefit the company? Well, I submit
17 to your Honor: A, that's an inherently factual question. But
18 I'd also say under Bondi, intent doesn't matter when we look at
19 the adverse interest exception.

20 The plaintiffs argue that we, the defendants, must be
21 innocent parties to have imputation. That's not correct under
22 Bondi and NCP. Both in Bondi NCP, the defendants got sued
23 because it's alleged they engaged in wrongful conduct. The
24 plaintiffs says actual knowledge is needed. Well, on this
25 record you could find actual knowledge from Robert James and

1 Betty Ann.

2 So we come back to this case, and I acknowledge on
3 Robert, Betty Ann and James, there's a fact dispute. But
4 there's not a fact dispute as to D'Apolito and Kelly O'Neill.
5 Not a fact dispute on the following, that: A, their conduct is
6 imputed to the company; and B, they were involved in the fraud;
7 and C, that fraud benefited Walsh by putting loans on the books
8 and giving Walsh profits at a higher value. On those two
9 employees, there is no fact dispute, and that's why we said in
10 our brief, under Federal Rule 55F, even though we have not
11 moved for summary judgment, where there is no fact, the Court
12 can search the record and conclude that summary judgment is
13 appropriate.

14 And once we get to Robert, James, Betty Ann, D'Apolito
15 and O'Neill being involved in the fraud, then under New Jersey
16 law there can be no recovery by the plaintiff.

17 THE COURT: Well, what is your answer to the
18 contention that the fraud of the executive is -- sister was not
19 related to this particular transaction?

20 MR. KOTT: When you actually look at -- I think that
21 was a statement about her guilty plea. When you look at our
22 statement of facts, you will see on the loans in this case,
23 there are ample facts that she was aware that they were
24 fraudulent. Doing such things as when the warehouse lender
25 said: I want to come and look at some of the properties,

1 because the properties were supposed to be fixed up and they
2 weren't, she gets on the phone and calls Kane and says: The
3 warehouse lender is going to inspect the properties. Go fix
4 them up before they get there.

5 When a purchaser of these loans, such as The Money
6 Store or Citicorp would purchase the loans, they come in and
7 they look at the underwriting file. They want to see what
8 they're purchasing, who is the borrower, and things of that
9 nature. What's the borrower's income? What's the appraisal
10 look like? There's testimony in this record that on these
11 loans, that Betty Ann DeMola had ch) party <KHREP BTS> go
12 files -- she would have employees come in and pull things out
13 of the files, the things that might make a buyer not want to
14 buy the loans.

15 So although Mr. Magnanini said that in terms of her
16 guilty plea, that was not with respect to these loans, when you
17 actually read each of the statement of facts beyond that, in
18 our statement of facts as it relates to Betty Ann DeMola on
19 these loans, there's ample proof that she lunches where they're
20 talking about the fraud. She's telling appraisers that they
21 should improperly appraise properties, and there's an
22 underwriter at the company named Rossi. And when he didn't
23 want to approve one of these loans, she came in and put
24 pressure on him as the sister of the company. There was an
25 underwriter on these monies named Acevito, who was taken off

1 the loans. By these loans -- Acevito is taken off because she
2 was raising questions about them. So I think under the
3 standard for summary judgment, I think when you look at our
4 facts, they do link up to these loans as to Betty Ann DeMola.

5 THE COURT: All right. Anybody else? Any response?

6 MR. MAGNANINI: Your Honor, very quick. Well, I think
7 I have nine quick points.

8 First one is, Mr. Kott or Mr. Hayes had actually said
9 that Walsh gave nothing away. Walsh suffered no losses.
10 That's clearly incorrect. Walsh wired 24 million dollars to
11 the two agents, and that was used to fund these loans. Walsh
12 received the loans back from the closing lawyer and they were
13 sold, as I told your Honor, because of the 60/40 deeds, its
14 mortgages were already in default. Walsh was obligated to
15 repurchase some. They bought back 2.4 million from The Money
16 Store. They bought back what ended up being about a 6 million
17 dollar judgment from these 32 loans from Cityscape, and they
18 brought back a number of loans. Walsh also in the securities
19 was entitled to receive residual rights on each of those
20 securities. Walsh would have gotten about 7.5 million dollars,
21 so they lost all five residuals, which is about 37.5 million
22 dollars. And, again, the reason we moved on these loans were
23 these loans were the ones that Walsh Securities had brought
24 back. The other loans Walsh Securities was unable to
25 repurchase. None of them turned out to be legitimate loans.

1 None of them anyone was happy with. But Walsh ran out of
2 money. The reason it ran out of money was because of title
3 companies investigation.

4 When we deposed Nancy Cook, who had worked on their --
5 this investigation for the title company, at least for the
6 Commonwealth, said she went down, met with Coastal Title
7 Company, and she copied its filed. And she came back: Did you
8 take any notes? No. Do you have any report? It looks like an
9 investigation that the titles companies did was just a sham.
10 And they came back and what they did by not moving forward,
11 Walsh amended their complaint, and then we engaged in
12 litigation. And here we are 15 years later and they still
13 haven't paid a penny, Walsh Securities, because they could not
14 repurchase these loans, as Mr. Walsh testified. They could not
15 get a clean bill of financial health from the accounts at that
16 time, that lead to our BMG canceling the mergers. So the loss
17 was borne completely by Walsh Securities. And as they said,
18 the Fidelity bond was issued by Lloyds of London, and the
19 Fidelity bond paid Walsh Securities, not the fraud of NHF, but
20 the fraud of these employees. And because Sedgewick Debtor,
21 which was hired by Lloyds of London, and did a giant
22 investigation, they came to the conclusion that Walsh
23 Securities was victimized by the fraud and D'Apolito and
24 O'Neill had acted against the company's interest and in their
25 own interest, and therefore Lloyds of London paid Walsh on the

1 Fidelity bond.

2 And Mr. Hayes had addressed the issue that Walsh
3 Securities does not have any standing, your Honor, mostly --
4 and he said they weren't holders of the mortgage. When you
5 flip back to Nat -- let me just check. It's a double answer.
6 When you flip back to the answer filed by Fidelity National
7 Title Insurance Company and you go to their eighth affirmative
8 defense, which has not be withdrawn, the eighth affirmative
9 defense says the claim -- I'm sorry, I'm going to read -- when
10 I go fast. The eight affirmative defense in Fidelity National
11 said the claims asserted by plaintiff do not arise under the
12 title insurance policies. In each transaction pleaded in the
13 fourth amended complaint, plaintiff maintains a valid first
14 mortgage lien on the subject premises. Here, the affirmative
15 defense is Walsh has a valid first mortgage lien. And then Mr.
16 Hayes is saying Walsh has no standing because it does in fact
17 have a valid first mortgage lien. This Walsh Securities sued
18 the title companies because they breached their contract.
19 There was an offer of the closing protection letter entitled
20 insurance policy. There was an acceptance by Walsh Securities.
21 It was performance at the closing. Walsh Securities funds were
22 taken from the closing attorney, Yacker or Cicalese, paid to
23 closing title, and were admitted to title insurance companies.
24 The monies have never been refunded to Walsh Securities. Once
25 it came to putting in a claim for the breach of the contract,

1 the title companies have failed to perform, and that's a simple
2 breach.

3 And Mr. Hayes says again, don't look at the current
4 law in New Jersey, don't look at Sears, and don't look at
5 Clients Security Funds, and don't look at Vision. We wrote
6 around that. They also wrote in the closing protection letters
7 that are issued here, the closing attorneys are not our agent.
8 That's specifically what it says. Two district courts and the
9 New Jersey appellate courts have since found the closing
10 attorneys are their agents, regardless of what they wrote.

11 And one of the interesting things, I did raise before,
12 your Honor, in 2006, they wrote to amend closing protection
13 letters again. And one of the things they specifically exclude
14 in 2006 is that the recipient and closing protection letter or
15 its employees participated in the underlying fraud. And so if
16 you go back to basic insurance Hornbook law, it's not excluded,
17 therefore it's covered. What they're doing in '06 is excluding
18 the very fraud they're now complaining about. Earlier in this
19 litigation they used to complain that Walsh was negligent. And
20 I think when you look at this January 31, 1997 letter that Mr.
21 Kott raised, that's a letter from Greenwich Capital to Walsh
22 Securities that says: You need to be careful.

23 Now, the interesting thing that Mr. Kott didn't tell
24 you about, one of the actual interesting things in the copy we
25 got, it's listed as Exhibit S. What's in Exhibit S is not that

1 letter, so I don't know if it's somewhere else in there. That
2 letter is -- that's quoted in the 56.1 statement, it's not in
3 their exhibit. But that letter, your Honor, was issued by
4 Greenwich Capital by a fellow named Don Lawson. And Don Lawson
5 worked for -- he -- every day he was that and he looked at --
6 if he was concerned that this was a fraud, which is what Mr.
7 Kott would like you to draw from the letter, that Walsh
8 Securities was on actual notice, again, not the construction
9 notice of a fraud, Mr. Lawson could have said to Greenwich
10 Capital: We're going to stop funding -- Greenwich doesn't.
11 Mr. Lawson continues to stay in Walsh Securities, even after
12 the letters, and reviews other loans from NHF. So the idea
13 that January 31, '97 letter put a senior management of Walsh
14 Securities on notice of a fraud is incorrect.

15 And then Mr. Kott says also that the reason Walsh
16 wanted these additional loans was it would increase their
17 inventory. That's directly contradicted -- the people involved
18 in the fraud knew enough to get these loans at a very high
19 interest rate. Loans with a very high interest rate were in
20 demand. Walsh paid the least amount of money for those and
21 then sold them. A loan with the high interest rate like these
22 were the least profitable to Walsh Securities and they actually
23 took away from the underlying value of the company. And I
24 think when we get down to the bottom of this, your Honor, when
25 you look at the title insurance policy which is what's at issue

1 in these 66 loans, the second thing that the title insurance
2 companies insured for, beyond just the lien, as soon as the
3 fraud was uncovered and Walsh told people it had purchased or
4 sold liens to, that there's a fraud out there and we're going
5 to figure out the number of the loans involved in the fraud.
6 These entities turned out. We don't want this. It's
7 fraudulent. There's nobody we can collect the deficiency. And
8 sixty percent of the property has been deeded away. You must
9 buy it back. Walsh was forced to buy the loans back, and
10 that's where the lossess occurred.

11 THE COURT: Just stay here a minute, if you would.
12 Let me do what I was going to do at the outset. I want to run
13 through one of these transactions and see if I can -- and the
14 one I'm going to run through is 1507 Summerfield Avenue -- what
15 town? I forget what town I was in. And outlined on page 2 of
16 one of your memoranda in opposition. Do you have that? I
17 think it's in opposition to defendants' motion for partial
18 summary judgment.

19 MR. MAGNANINI: I believe it's in opposition to the
20 bad faith --

21 THE COURT: It is the --

22 MR. MAGNANINI: Bad faith.

23 THE COURT: It's the December 22nd, 2011 memorandum in
24 opposition to the motions for partial summary judgment to
25 dismiss with prejudice the bad faith claims.

1 MR. MAGNANINI: Yes, your Honor.

2 THE COURT: I want to run down through that and see
3 where you say the fraud was committed, or where the title
4 insurance of the closing letter came in. I'm just running down
5 the sequence of events that's set forth in your brief.

6 So you say on October 14th, 1996, Coastal Title, which
7 was the agency you say for the title companies issued two title
8 commitments to two different purchasers. One of them was to
9 Cristo saying that the property was owned by HUD,

10 MR. MAGNANINI: Right.

11 THE COURT: And the other commitment was to NHF, which
12 is owned by Cristo. Now, Schedule B, of the first one, first
13 title commitment, says that in order to convey title, you
14 needed a deed from HUD. Where did HUD come into this?

15 MR. MAGNANINI: HUD was the actual owner of the
16 property, your Honor. So they had -- they had acquired this
17 property in -- and I would assume in some sort of foreclosure
18 action. So Cristo property is purchasing it from HUD.

19 THE COURT: All right. So that was a legitimate
20 statement. So they needed a deed from HUD to convey title.

21 MR. MAGNANINI: Correct.

22 THE COURT: So Schedule B of the parallel, HUD title
23 commitment, said they needed a deed from Cristo to Racigliano,
24 and a mortgage by Racigliano.

25 MR. MAGNANINI: Correct.

1 THE COURT: Now, there was, what, assuming that HUD
2 would convey to Cristo, what was the point of all that?

3 MR. MAGNANINI: Yes, your Honor. This was the nature
4 of these transactions, that Cristo would buy the property from
5 a legitimate entity, and then turn around and sell it to a
6 strawbuyer, and so Racigliano is not, as I keep saying, a bona
7 fide --

8 THE COURT: He was a strawbuyer.

9 MR. MAGNANINI: A strawbuyer, yes, your Honor. So
10 what Coastal Title does, your Honor, in order to keep these
11 things clear, as you see they have a commitment number which is
12 18721 on the purchase from HUD to Cristo, and then they flip
13 over and on the commitment number from Cristo to Racigliano,
14 they have -- it's CT 18721 and in parenthesis there's a capital
15 A.

16 THE COURT: This looks like funny business to me right
17 from the beginning.

18 MR. MAGNANINI: That's what we're saying. The one
19 that shows that there's problems with HUD to Cristo, never
20 gives to Walsh. What they give Walsh Securities is --

21 THE COURT: Cristo and Racigliano.

22 MR. MAGNANINI: Yes, your Honor. And what would
23 happen is once Cristo closes with Racigliano, they would then
24 from have the cash to actually pay HUD.

25 THE COURT: All right. And then on -- all this --

1 this is listed in the background. On October 30th, 1996,
2 Coastal Title issued a closing protection letter which had two
3 obligations, failure to comply with written instructions and
4 fraud.

5 MR. MAGNANINI: Correct, your Honor.

6 THE COURT: And those were the two eventualities that
7 protected against.

8 MR. MAGNANINI: Correct.

9 THE COURT: And then November 25th, 1996, a person
10 named Hill sold 1507 to Cristo for \$37,500. Where did Hill
11 come from?

12 MR. MAGNANINI: Yeah. We're actually not sure, your
13 Honor. Well, I think what we got from -- in discovery from
14 Coastal Title was that the property was actually owned by HUD
15 and was being transferred to Cristo. This Mr. Hill, I'm not
16 sure if he was the original owner and HUD doesn't actually have
17 a claim on it, or he had acquired it from HUD and then he sold
18 it to Cristo. But the deed that gets filed here is actually --
19 says from Hill to Cristo, which is different than the original
20 title commitment issued by Coastal Title.

21 THE COURT: All right. So now we have the Hill
22 through Cristo for 37,500. Then on December 18th, 1996, Walsh
23 table funded the purchase of this property pursuant to a
24 \$110,625.00 mortgage and \$147,500 purchase price.

25 MR. MAGNANINI: Correct, your Honor.

1 THE COURT: With no down payment by Racigliano, who
2 was a strawbuyer.

3 MR. MAGNANINI: And I believe this was one where a
4 second mortgage was given on the property.

5 THE COURT: All right. That was December 18th.
6 December 27th, 1996, you have to prepare -- you have to prepare
7 a deed giving Capital assets, a 60 percent interest in 1507.
8 That's called the joint venture deed.

9 MR. MAGNANINI: That's what we refer to as a joint
10 venture, correct.

11 THE COURT: And the deed was from whom to whom?

12 MR. MAGNANINI: The deed then is from Racigliano, the
13 strawbuyer, to Capital Asset, getting 60 percent and Racigliano
14 retaining 40 percent to the property.

15 THE COURT: All right.

16 MR. MAGNANINI: And so the only person they have a
17 mortgage with is Racigliano. So all that's securing the
18 mortgage of 110,000 is now a minority share of the property of
19 40 percent.

20 THE COURT: Had Racigliano already signed the \$110,000
21 mortgage?

22 MR. MAGNANINI: Yeah. These documents, as we
23 understand, were all signed together at the closing. So she'd
24 signed the mortgage and the joint venture agreement, and all
25 the paperwork together.

1 THE COURT: All right. And then on April 9th, 1997,
2 the joint venture deed was recorded prior to the mortgage by
3 Coastal Title.

4 MR. MAGNANINI: Correct, your Honor. That's part of
5 that large batch of documents that I referenced, that Coastal
6 Title was given \$50,000, and Kane took it from attorney
7 Yacker's trust account. And they filed hundreds of --
8 literally hundreds of documents in three days in April.

9 THE COURT: All right. That was April 9th. Also on
10 April 9th Commonwealth Title issued a title policy that said
11 that title was vested in Racigliano.

12 MR. MAGNANINI: Correct, your Honor.

13 THE COURT: Well, do you call that part of the fraud?
14 Why would it be vested in Racigliano?

15 MR. MAGNANINI: They would have had to do a -- go back
16 and make sure that all of these things were correct before
17 issuing the title insurance policy. But this one that gets
18 issued is to Pamela Racigliano as the owner of the property.

19 THE COURT: Well, where does Walsh come in on all
20 this? You're the mortgagee?

21 MR. MAGNANINI: Correct, your Honor. These loans
22 were -- Walsh was a mortgage lender, and it had a series of
23 people who called correspondence, who were out there getting
24 people who needed mortgages. National Home Funding was one of
25 these correspondence, so it would bring loans to Walsh

1 Securities the same as any number of them. Walsh would look at
2 it, and if it was acceptable, they would table fund it. So at
3 the closing, the documents were done in the name of National
4 Home Funding, Walsh's money gets used, and then at the closing,
5 Walsh's money is distributed and the paperwork and the note and
6 everything was returned to Walsh Securities. And Walsh
7 Securities falls into this by the name of the insured, your
8 Honor. National Home Funding, it's you subserve and/or
9 assigns, and as I think Mr. Hayes was saying at the closing
10 Walsh Securities would send over assignments to National Home
11 Funding. The loan would close in the name of National Home
12 Funding with Walsh Securities funding it, with the Capital
13 table funding it, and then it would be assigned over to Walsh
14 Securities.

15 THE COURT: Now, where do the assignments come in?
16 Well, were the assignments from National Home Funding executed
17 at the closing to Walsh?

18 MR. MAGNANINI: No, your Honor, they were executed by
19 Mr. Skowrenski, who was the president of National Home Funding.
20 So Mr. Skowrenski's business operated -- he had a small staff
21 and got loans in, and he had a number of loan officers out
22 there, Mr. Kane included, running around getting properties,
23 bringing them into him. And so once the money was paid at
24 closing, or actually before the money was paid at closing, NHF
25 would receive assignment from Walsh Securities, and Mr.

1 Skowrenski would execute it, and he know send it back to Walsh
2 Securities. That would then be married up with the closing
3 packet that would then been returned from the approved closing
4 agent at Walsh Securities.

5 THE COURT: All right. Well, where does the closing
6 letter, protection letter and the title policy come in that is
7 the basis for your claim?

8 MR. MAGNANINI: Both of them, your Honor, were
9 prepared, and I guess issued in the regular course of business,
10 and they were both issued to NHF, it subserves and assigns. So
11 because Walsh -- the way that this part of the mortgage
12 business works, it works like this. They were brokers who
13 would get the property and bring them to a lender. The lender
14 would fund the closing and then would be assigned the mortgage
15 and paperwork. Well, Walsh Securities would take this packet
16 and say: Here's a mortgage note, deed, and here's assignment
17 from NHF. And it would either provide them for sale to the
18 whole buyer, or to the title, or to the security, and then they
19 would be transferred out of Walsh Securities. Walsh would then
20 receive money back that would go back to Greenwich Capitol, and
21 that would go back to make a subsequent loan.

22 THE COURT: All right. I want to run down National
23 Title's sequence of events, and see how it relates to what
24 we've just discussed here. It says that the first step would
25 be the mortgage broker would take a loan application and get

1 documentation and then a loan package would be forwarded to
2 Walsh.

3 MR. MAGNANINI: Correct.

4 THE COURT: And this is page 4 of National Title's
5 brief, I'm not sure which one. You can just follow the
6 sequence of events. The mortgage broker takes the loan
7 application, and gets the documentation, and orders an
8 appraisal and brings the loan package to Walsh

9 MR. MAGNANINI: Yes.

10 THE COURT: So that would be the first step. And then
11 Walsh would review the package and issue a commitment for the
12 loan to the broker and prepare the loan documents.

13 MR. MAGNANINI: Correct, your Honor, yes. Mr.
14 D'Apolito was the salesman for Walsh, so he had a relationship
15 with National Home Funding. They would say to him: We'd like
16 this loan to be funded by Walsh. He would bring it in, the
17 Walsh underwriters, a separate department, and say: It meets
18 our credit risk guidelines, and we can fund this at this
19 interest rate.

20 THE COURT: This is in anticipation of National --
21 actually executing the loans, advancing the loans.

22 MR. MAGNANINI: Exactly. The National Home Funding,
23 what they would do is the correspondence or mortgage brokers
24 would actually shop the loan to a number of different lenders
25 and try to get the most points for themselves at the best

1 interest rate for the buyer. And so depending on what the
2 response was, the loan would be either funded by Walsh or NHF
3 was free to say: Your interest rate is too high, we're not
4 going to receive sufficient points, we'll fund our loans
5 somewhere else.

6 THE COURT: Then this description of the procedure
7 goes on to say that the closing department -- was that the
8 closing Department of Walsh?

9 MR. MAGNANINI: At Walsh Securities, yes, your Honor.

10 THE COURT: Not NHF, it would be Walsh?

11 MR. MAGNANINI: Yes, correct.

12 THE COURT: And issue the closing instruction and
13 arrange for the transfer of the funds to the closing attorney.
14 Now, the instructions would be issued to whom?

15 MR. MAGNANINI: To Mr. Yacker or Mr. Cicalese.

16 THE COURT: Whom was Yacker working for?

17 MR. MAGNANINI: Yacker worked ostensibly for -- he
18 was a representative of the strawbuyer. And as the case law
19 says, the agents and the title companies, in fact he was
20 working for Mr. Kane because he didn't do the closings, his
21 paralegal Mr. Kane did.

22 THE COURT: All right. And this would go to him?

23 MR. MAGNANINI: Yeah.

24 THE COURT: And I'm just trying to link this up to the
25 description of the 1507 transaction. Where it says that on

1 December 27th, Yacker prepared the deed giving Capital
2 Associates 60 percent interest. I guess that would be
3 independent of your instructions.

4 MR. MAGNANINI: Correct, your Honor.

5 THE COURT: All right. All right. Then all the loans
6 going back again to Nations Title, a description of the
7 procedure, all the loans subject to the litigation were closed
8 by NHF, title policy issued to NHF, and subsequently assigned
9 to Walsh. That would be correct?

10 MR. MAGNANINI: That's correct, your Honor. I believe
11 the two title policies were actually sent directly to Walsh
12 Securities and not to --

13 THE COURT: Not to NHF.

14 MR. MAGNANINI: Not to NHF.

15 THE COURT: And then the next step Walsh prepared the
16 assignment. Which assignments were those?

17 MR. MAGNANINI: They were actually what they call
18 assignments in blank, your Honor. And so on the mortgage
19 package, once they got everything done on top, they're being an
20 assignment, it says assignment dated January 18th, 2012, from
21 Walsh Securities to, and it would be left --

22 THE COURT: NHF to Walsh.

23 MR. MAGNANINI: That was already in the package, your
24 Honor, before the closing occurred. NHF would execute
25 assignment assigning the mortgage and loan back to Walsh

1 Securities.

2 THE COURT: And where they say Walsh prepared
3 assignments and sent them to NHF for executions, which
4 assignments would those be?

5 MR. MAGNANINI: Those are the assignments from NHF
6 back to Walsh.

7 THE COURT: Okay.

8 MR. MAGNANINI: I was further on in the process.

9 THE COURT: All right. Then it says NHF executed the
10 assignments and returned them to Walsh.

11 MR. MAGNANINI: Correct.

12 THE COURT: And then Walsh executed the additional
13 assignments of the loan document blank for the benefit of the
14 ultimate purchaser of the loan on the secondary market.

15 MR. MAGNANINI: Correct, your Honor. So at the top of
16 the loan packet is assignment date, with a date from Walsh
17 Securities to blank, therefore, The Money Store, if it
18 purchased the loan. And if it decided to keep the loan, it
19 would fill its name in, or it would sell it again and it would
20 go -- it could go further on in the secondary market.

21 THE COURT: And then that's the last step listed here,
22 Walsh transmits both assignments to the whole loan, to the
23 whole loan buyer of the mortgage, expecting it to record the
24 assignments.

25 MR. MAGNANINI: Correct.

1 THE COURT: Well, why wouldn't Walsh -- well, I
2 suppose at that point, that at that point there had not been
3 the 60 percent assignment, it would have been no problem.

4 MR. MAGNANINI: Initially it wouldn't have been a
5 problem, your Honor. Eventually once Walsh discovered that
6 these loans were part of a fraud and the strawbuyers couldn't
7 make the payments, you have the market contact problem we're
8 complaining of.

9 THE COURT: Well, I'm just trying to think, what if
10 there had not been this assignment of 60 percent of the
11 mortgage, then the whole hundred percent would be covered by
12 the assignments to the loan buyer of the mortgage.

13 MR. MAGNANINI: Yes, your Honor.

14 THE COURT: It shall be a worthless piece of property.

15 MR. MAGNANINI: Right. In our most extreme example,
16 the property was purchased for \$10,000 and was appraised at
17 100- or \$200,000, and Walsh loaned 150,000 on it. So there was
18 no way the \$10,000 property was going to be worth 150. And
19 because the strawbuyer wasn't a bona fide purchaser, he was
20 never going to make payments. And if Walsh pursued him, he was
21 never going to be able to collect them.

22 THE COURT: So you were victimized where in this
23 process?

24 MR. MAGNANINI: We're victimized throughout the
25 process that initially, like your Honor said, with the 60/40,

1 you've given away the majority of the loan securing the
2 property, thereby putting the mortgage into default. So as
3 soon as Walsh transferred this to someone else, it was
4 subjecting itself to having to repurchase these loans because
5 of the fraud. And then because of the nature of these
6 transactions that the strawbuyers were used, and the
7 strawbuyers were paid money. They each got about \$1,750.00 for
8 the property. They were mostly used because they had clean
9 credit. Again, when Walsh -- even if it received a first lien
10 interest in the property, the other two things that Vision
11 court says the lender bargains for, didn't get, it didn't get a
12 bona fide purchaser to make payments, and it didn't get
13 purchasers to pursue. Even if it foreclosed on a \$10,000
14 property, it would have still be owning \$140,000 property.

15 THE COURT: Well, the real fraud was at the beginning.

16 MR. MAGNANINI: Yes, your Honor. Yes, your Honor.

17 The flip was Mr. Kane's purchase and the subsequent --

18 THE COURT: And you're just transferring a piece of
19 junk up and down the line.

20 MR. MAGNANINI: Right. But it was junk that had been
21 appraised to make it not look like junk.

22 THE COURT: All right. Well, I'm just -- so where
23 does -- where did the title companies come into this?

24 MR. MAGNANINI: Well, the title companies come in, we
25 believe, in two areas. Again, contract claims, they issued the

1 closing protection letters to protect Walsh against failure to
2 follow their closing instructions, which as we said, the
3 closing attorneys Mr. Yacker and Cicalese admit that they knew
4 all about the strawbuyers, and knew none of these guys could
5 make any payments. They took money and they didn't give it to
6 Cristo as the seller, they took money and gave it to Mr.
7 Pepsny, Cristo's lawyer, to buy the property. They took money
8 and gave it to Mr. Cristo to pay the mortgage. And they took
9 money and gave it to Kane as profits. They took money to gave
10 it to Grieser to pay the strawbuyers.

11 THE COURT: What was the -- what was the fraud -- what
12 was the instructions they failed to follow?

13 MR. MAGNANINI: We've got -- like I said, your Honor,
14 when they signed the HUD-1, it shows that they -- they've
15 actually disbursed the proceeds in the matter according to the
16 HUD-1, and the HUD-1 fails to mention payment to Mr. Pepsny.
17 After the closing, they would do a number of closings, and Mr.
18 Kane would have a memo that she would send around to the
19 various participants. And one memo says: Looks like a good
20 Christmas. Here's \$300,000 to Mr. Pepsny to pay for the
21 properties that Mr. Kane has already sold and has been funded
22 with Walsh Securities' money. Here's money to Mr. Grieser to
23 make mortgage payments. And here's money to pay off the
24 strawbuyers. Here's money to Mr. Yacker. Here's money to Mr.
25 Kane. And so at the closing, the closing attorney, knowing of

1 Walsh Securities closing instructions, and there's a number of
2 instructions that were listed in our papers, which Mr. Mee will
3 pull out for me, that were violated. The base one is that they
4 send back a HUD-1 not showing where all this money was
5 distributed, and that's a lie. And so that with the
6 participation of the closing attorneys, we're arguing vigorous
7 coverage under the closing protection letter, which insures
8 against the fraud in the lawyer because we're not getting good
9 title. And when you go to the title insurance policy that the
10 protection letter is part of, it's the second thing that
11 they're insuring against is the marketability of the property.
12 And it's clearly not marketable because once it's discovered
13 that these properties are part of a fraud, all of the
14 purchasers demand they be repurchased.

15 THE COURT: Well, the fraud element of the closing
16 letter has certain limitations. It has to be fraud with
17 respect to it. I forget what the exact language was. Mr. Kott
18 very eloquently said it. Nothing to do with the -- what you're
19 claiming. And the fraud that you're alleging didn't fall
20 within that category that was specified in the closing
21 protection letter.

22 MR. MAGNANINI: Well, as base, your Honor, what we're
23 alleging is the title we got to this property was worthless
24 because 60 percent had been deeded away. And then, as I said,
25 under the policy, it's not marketable. And the first thing is

1 it's insuring is the title. There's a --

2 THE COURT: Well, I'm with the closing letter at the
3 moment. What is the qualification of the fraud? Do you have
4 the closing letter? I made a copy of it, but I don't seem to
5 have it in hand.

6 MR. MAGNANINI: Here you go, your Honor.

7 THE COURT: What does the fraud have to be?

8 MR. MAGNANINI: The first thing that it's insuring
9 circumstances against is failure of the issuing agent or the
10 attorney, Mr. Yacker or Mr. Cicalese, to comply with the
11 written closing instructions. And like I said in our papers,
12 there's a number of things that they failed to comply with.

13 THE COURT: I'm not on that one. Number 2, fraud, it
14 has to be in relationship to --

15 MR. MAGNANINI: And that flips you back. Number 2 is
16 fraud in handling the funds in connection with the matter set
17 forth in number paragraph 1 above. And when I went back to
18 number 1, your Honor, number 1 says the failure of the issuing
19 agent or the attorney to comply with Walsh Securities' written
20 instructions --

21 THE COURT: You have to read it more slowly and more
22 loudly.

23 MR. MAGNANINI: Your Honor, number 1 says the failure
24 of the issuing agent or attorney to comply with Walsh
25 Securities' written closing instructions, to the extent that

1 written closing instructions relate to the title in said
2 interest in land --

3 THE COURT: Relate to what?

4 MR. MAGNANINI: The title in said interest in land.

5 THE COURT: Yes.

6 MR. MAGNANINI: And what we're saying is, at the
7 closing, 60 percent of the title to the land is being deeded
8 away. That 60 percent in certain instances, the one we gave it
9 in here, is actually being recorded ahead of the mortgages. So
10 Walsh Securities is giving a mortgage for \$110,000, and is only
11 receiving security of 40 percent. What they're getting back,
12 unbeknownst to them because of the fraud of the closing agent,
13 is a mortgage that's defective. It's a mortgage that's been --
14 that's been accelerated, and it's a mortgage that's in
15 default --

16 THE COURT: How did that fall into the final paragraph
17 of the qualifiers of fraud that's covered by the closing
18 letter?

19 MR. MAGNANINI: What do you mean by the final
20 paragraph, your Honor?

21 THE COURT: Well, there's --

22 MR. MAGNANINI: Well, at the very end --

23 THE COURT: There are two things you're protected
24 against, the failure to file instructions, and the second
25 thing --

1 MR. MAGNANINI: Right, your Honor.

2 THE COURT: And the fraud has to relate to --

3 MR. MAGNANINI: That takes you back and relates to the
4 first paragraph, which says if they fail to comply with the
5 closing instructions relating to the title to said interest in
6 land.

7 THE COURT: Now, Mr. Kott, you've given me every
8 final written -- which I can't find what I'm looking for.

9 MR. MAGNANINI: Yeah. I think what you're looking
10 for, in number one, there's an A, and a B.

11 THE COURT: All right. Number 1, paragraph -- yes.

12 MR. MAGNANINI: And so it says, one says, if the agent
13 fails to follow the closing instructions and that violation
14 relates to the title to said interest in land, which is what
15 we're saying, we got a defective title because our mortgage was
16 already in default when it came back to Walsh Securities; and
17 then two, or validity and enforcement of priority of lien in
18 said mortgage and said land. And on those -- on the examples
19 that we gave your Honor, the 60/40 deed is filed and recorded
20 ahead of Walsh Securities. And in those cases, the validity
21 and enforceability and priority of the lien is secondary to
22 joint venture deed. So Walsh is being harmed in that way as
23 well. And then the net -- the ending sentence, the little
24 about, in parenthesis, the collection of payment of funds due
25 you, doesn't really apply here. All the money came from Walsh

1 Securities. There was no money going back to Walsh Securities.
2 So what we're alleging is the violation of the closing
3 protection letter falls under both number one, the failure to
4 follow the closing instructions which results in its defective
5 title; and number two, the fraud, which again takes you back,
6 and both things we ended up with the same piece --

7 THE COURT: Well, I think that covers what I was going
8 to go into. All right.

9 Mr. Kott, do you have anything you want to add to
10 this? In one of your briefs, you contend that the -- the
11 grievance here doesn't fall within the closing protection
12 letter.

13 MR. KOTT: Correct. And I'm going to yield to Mr.
14 Hayes on that. I think the Court has focussed in on the issue,
15 we first examined the closing service letter and what coverage
16 it provides. And I was listening to the colloquy with Mr.
17 Magnanini and your Honor where Mr. Magnanini went through six
18 or seven items which clearly were fraud, there were no question
19 there was frauds in these loans, but none of which he was able
20 to articulate fit within the terms of paragraph one and two of
21 the closing service letter.

22 When your Honor had asked him that --

23 THE COURT: Well, it seems to me that the coverage in
24 the closing letter is pretty broad.

25 MR. KOTT: Well, I'm not sure I agree with you. It's

1 limited in the following way, ITS failure to follow the closing
2 instructions.

3 THE COURT: Right.

4 MR. KOTT: So that could be an act of fraud by the
5 closing lawyer that is unrelated to the closing instructions.

6 THE COURT: Well, I don't know what the closing
7 instructions were.

8 MR. KOTT: And I'm not the moving party on plaintiffs'
9 motion, and I'm going to yield to Mr. Hayes right now. This
10 relates to a core argument of the defendants in opposition to
11 plaintiffs' motion for summary judgment. And that is, the
12 burden on the motion for summary judgment on plaintiffs is to
13 demonstrate that they're entitled to a judgment as a matter of
14 law, which means, number one, they have to show you the closing
15 instructions; number two, they have to show you how there was a
16 violation of the closing instructions; and number three, how
17 the violation of the closing instructions fits within the
18 closing service letter.

19 Mr. Hayes.

20 MR. HAYES: Judge, if I may, with respect to the 60/40
21 deeds, we need to understand what we're dealing with, and the
22 ramifications of the 60/40 deeds, because with all due respect
23 to Mr. Magnanini, his position simply ignores New Jersey law
24 regarding the effect of these deeds. We have a strawbuyer
25 purchasing a property, one hundred percent of the property,

1 from whomever the third party is. That straw party is
2 borrowing 100 percent of the inflated purchase price from NHF.
3 That buyer then is given 60 percent of his ownership interest
4 in the property to Capital Assets. So what you have is after
5 the transaction is complete, you have a mortgage signed by the
6 borrower, the strawbuyer on a property that is owned 60 percent
7 by Capital Assets and 40 percent by the strawbuyer.

8 Now, in many of these transactions, Judge, the
9 recordation occurred the way they were supposed to, and that is
10 that the deed to the strawbuyer was recorded. The mortgage
11 from the strawbuyer to NHF was recorded --

12 THE COURT: First or second, before or after the
13 strawbuyer?

14 MR. HAYES: The deed into the strawbuyer was recorded.
15 In most of the transactions, you've got -- so if we say Hayes
16 is a strawbuyer, the deed from Cristo to Hayes is recorded.
17 The mortgage from Hayes to NHF is recorded.

18 THE COURT: All right.

19 MR. HAYES: And then the deed from Hayes and Capital
20 Assets is recorded. Okay, that's the way the bulk of these
21 transactions took place. So that when --

22 THE COURT: I understood that the deed to Capital
23 Assets was recorded before.

24 MR. HAYES: There were some. What I'm trying to show,
25 your Honor, the whole plethora of what we're dealing with here.

1 I think it's important to understand there were deeds recorded
2 in the proper order. When the proper recordation occurred,
3 Judge, you had Capital Assets requiring a 60 percent interest
4 in the property, subject to the mortgage that had been given by
5 Hayes to NHF.

6 THE COURT: All right.

7 MR. MAGNANINI: So much like, your Honor buys a
8 property and you get a mortgage from FMAC. And you then
9 transfer an interest in the property. That third party
10 requires, let's focus on what happened on the 21 -- on the 21
11 of 220 claims that they've asserted where the recordation was
12 in the incorrect order, and that is that the deed that Hayes
13 acquires, the property is recorded, the deed from Hayes and
14 Capital assets is recorded, and then the mortgage is recorded.
15 We acknowledge, Judge, there is a title problem that exists as
16 a result of that recordation. The problem, however, is with
17 the statement that's made. Their problem is one that renders
18 the property valueless, or that enables Capital Assets to argue
19 that its 60 percent interest in the mortgage -- 60 percent
20 interest in the property is not subject to the mortgage. The
21 problem with that analysis is New Jersey law is very clear,
22 Judge, when a third party acquires an interest in a property,
23 okay, it can only be a good faith purchaser for value under New
24 Jersey law such that it could take an interest separate and
25 apart from a mortgage that may have been given, if it takes

1 title to the property without knowledge of the existence of
2 that mortgage and it pays fair value for it.

3 In this case let's not forget who Capital Assets is,
4 the person that got these 60 percent interest. It was Gary
5 Grieser, a ring leader of this fraud. Mr. Grieser, at the time
6 he acquired his 60 percent interest in the property, knew full
7 well that NHF had lent the monies to the buyers. When Mr.
8 Grieser acquired his 60 percent interest in the property, they
9 did not so for no consideration. So although counsel is
10 correct, a title property was created by the recordation, it
11 does not render that mortgage invalid. And in fact, Judge, had
12 they notified the title companies of this error in the
13 recording, long before their mortgages were divested by
14 foreclosures, tax foreclosure sales, the title companies could
15 have fixed this problem. Title companies all the time, myself
16 included, Judge, bring corrective actions to fix problems such
17 as this. I would have filed a lawsuit against Capital Assets,
18 Mr. Grieser, saying because of an error in the recordings of a
19 deed, your ownership interest appears to be free and clear of
20 the mortgage. However, because you bought the property and
21 took possession of the property, and because you did not pay
22 fair value for it, New Jersey recording statutes say you,
23 Capital Assets, took your interest in that property, subject to
24 the mortgage.

25 So we can't jump, Judge, from the fact that there's an

1 error in recording to the fact that this mortgage is worthless,
2 or to the fact that there's a violation of the closing
3 instructions, or to the fact that this had something to do with
4 the fraud. Counsel would need to acknowledge that if the fraud
5 was to give away this 60 percent interest before the mortgage
6 was recorded, they viewed it up on all those 200 transactions,
7 they only did this on 21 transactions. And the record I think
8 will be relatively clear at the time of trial, they did it
9 because of the confusion that it existed when this mass filing
10 took place.

11 Now, the problem that we're in, Judge, is that until
12 the forth amended complaint, Walsh does not make title claims
13 until Magistrate Judge Shipp directs Walsh to identify the
14 properties on which it makes title claims. We don't even know
15 which properties are the subject of the title claims until
16 their response to my motion for summary judgment, where I state
17 that all the title claims should be thrown out because they
18 lost their interest due to their failure to report their
19 assignments. It was only in their response that they raised
20 for the first time that you had these 60/40 deeds. Raising it
21 then for the first time puts us in the improper position, our
22 argument where they've already lost their mortgages at
23 foreclosure sales, we're not in a position to bring the
24 proceeding that we could very easily brought against Capital
25 Assets to fix the problems on those 21 properties that

1 resulted --

2 THE COURT: Why would you want to fix them if they're
3 worthless properties?

4 MR. HAYES: We have an obligation to fix them. We
5 don't insure the value of the real estate. What title policies
6 do is say you have a valid mortgage on the properties. We have
7 the burden to fix that property. If it turns out because of
8 phony appraisals those properties are not worth what they
9 should be worth, we don't insure the appraisal value. But what
10 happened in this case, by them waiting until -- and let's get
11 the dates right here, to almost twelve years after all of these
12 transactions closed to raise title issues for the first time,
13 and after all of their mortgages had already been divested, not
14 because of the 60/40 deeds, and not because of any fraud, but
15 because the properties were all sold at tax sales of which they
16 got no notice because they hadn't recorded that assignment, we
17 weren't in the position to do anything, Judge.

18 So counsel can talk all he wants about failure to
19 follow closing instructions and fraud relating to these 60/40
20 deeds, that didn't fall within the language of the closing
21 service letter. That's a title claim. There's a title policy
22 that's in effect. Errors are made in recording documents all
23 the time, Judge, but that doesn't mean a closing service letter
24 claim arises. If your Honor looks, there's nothing in the
25 closing service letter that's violated by that 60/40 deed. Any

1 buyer has the right to transfer an interest in a property after
2 they borrowed money. It may be a default under the mortgage,
3 but there's no prohibition against a buyer transferring his
4 interest. When the buyer transfers his interest in the legal
5 estate, it doesn't make the property unmarketable.

6 In this case, those 60/40 deeds we think are a red
7 herring, Judge, that have been raised simply because Walsh
8 cannot find a way to fit the conduct in this case, into the
9 limited language that currently exists in the letter. Thank
10 you.

11 THE COURT: All right. Well, I think as far as the
12 other defense motions, I might as well do them on the papers,
13 unless you feel you need argument?

14 MS. WAGNER: Your Honor, one quick thing. What I was
15 looking for is the section of the closing instructions that we
16 allege that lawyers failed -- the closing instructions that the
17 lawyers failed to comply with, 12 and 13 of our moving papers.

18 THE COURT: Okay.

19 MS. WAGNER: Your Honor, if I can have one minute with
20 respect to Nations and Fidelity with respect to the title
21 claims.

22 THE COURT: All right.

23 MS. WAGNER: Amy Wagner from Stone and Magnanini on
24 behalf of plaintiff Walsh Securities. I just want to make sure
25 it's clear to the Court, you'll probable notice when you're

1 looking at the papers in the moving brief with respect to the
2 title claims, they categorize the issue as, can Walsh make
3 claims under title insurance policies for losses resulting from
4 the failure to record assignments on the 29 properties when
5 Walsh was in control of the assignments and never provided them
6 to the closing attorney or the title agent for recording,
7 instead relying on the secondary market purchasers to record
8 the assignments? And as we said in our opposition brief, we
9 never made that allegation. We never said that we were holding
10 the title insurance companies liable for the assignments not
11 being recorded. And in their reply they allege a slew of other
12 arguments that we never had an opportunity to respond to, and
13 we just think that the Court should not consider those
14 additional arguments.

15 THE COURT: All right. Good. What about these three
16 or four motions of the defense?

17 MR. KOTT: Your Honor, I'll let Mr. Hayes speak for
18 himself on his motion. I think he just addressed late notice.
19 That is Mr. Hayes' motion on the policy claim, not on the
20 closing service letters. He raised on behalf of all the
21 defendants what we would call a late notice defense, that is,
22 they first put us on notice 12 or 14 years after the loss
23 occurred, and by that time we were not able to prevent the
24 loss, as we normally would. So I think in effect you heard
25 from Mr. Hayes on that.

1 There are two additional motions, and I'm going to
2 just set -- tell the Court what they are, and what the issues
3 are, and then your Honor can tell us if you want oral argument.
4 We have a motion on damages.

5 THE COURT: Yes. You don't think they are entitled to
6 the damages, the value of the merger.

7 MR. KOTT: Right.

8 THE COURT: And the loss of the business value.

9 MR. KOTT: And that's a partial summary judgment on
10 damages because they are entitled, if they meet all their
11 elements, to what they lost on the loans, the merger damages,
12 or the diminution. That we have an argument on standing and we
13 have an argument back to law school, Hadley vs. Backsendale,
14 that it's not foreseeable that we would get \$25.00 for a
15 closing service letter that insured \$100,000 property in Asbury
16 Park, and that we would end up being faced with 400 on --
17 \$440,000,000 in damages. That's the issue on that.

18 On bad faith, the issue as we frame it is under
19 Kretster, which is a Third Circuit case. Under the New Jersey
20 Supreme Court case in Picken. Under your Honor's decision in
21 Dare, which is one of the cases you had a motion on. If the
22 plaintiff is not entitled to summary judgment on coverage, then
23 the plaintiff, as a matter of law under New Jersey law, is not
24 entitled to bad faith or breach of fiduciary duty. The Third
25 Circuit said that, and the Supreme Court of New Jersey said

1 that, and your Honor in some of your conclusions have said
2 that. Those are the issues.

3 If the Court wants argument on those --

4 THE COURT: I really don't.

5 MS. KOTT: Okay.

6 THE COURT: All right. I've read the briefs and all
7 those arguments, and I think the response to those arguments
8 are IN the answering briefs. So i figured that, the main
9 motion for summary judgment would bring out these various
10 issues, and I think it has. So why don't we just, let us go to
11 work on the briefs, on all the motions, and on the argument on
12 the summary judgment motion of the plaintiff today. All right.
13 Well, thank you, very much, you've given me lots to think
14 about.

15 (Matter concluded.)

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